# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 120

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GUARANTY TRUST COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1934.
CERTIORARI GRANTED OCTOBER 15, 1934.

# SUPREME COURT OF THE UNITED STATES

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## GUARANTY TRUST COMPANY OF NEW YORK

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

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1 In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
*v.*
GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT-APPELLANT

*Statement under Rule XIII*

The above-entitled action was commenced by the service of a summons on the defendant on or about September 5, 1929, and the complaint was served on or about January 22, 1930. Issue was joined by the service of an answer to the complaint on or about April 14, 1930. The complaint was filed on January 23, 1930, and the answer was filed on April 14, 1930. The original parties were those above named. The defendant was at no time arrested, and no bail has been taken and no property attached.

This action was tried before Honorable Francis G. Caffey, United States District Judge, and a jury of one, on May 15, 1933, and judgment was given in favor of the plaintiff. No question herein has been referred to a commissioner, master, or referee.

The judgement herein appealed from was entered on June 1, 1933. This appeal was taken on July 11, 1933.

2 In United States District Court, Southern District of New York

L. 45, page 245

UNITED STATES OF AMERICA, PLAINTIFF
*v.*
GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT

*Summons*

*To the above-named defendant:*

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable John C. Knox, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this fourth day of September, A. D. 1929.

ALEX. GILCHRIST, Jr., *Clerk.*

CHARLES H. TUTTLE,
*U. S. Attorney, plaintiff's attorney,*
*Office and Post Office Address, U. S. Attorney,*
*U. S. Courthouse and P. O. Building, Borough of*
*Manhattan, New York City.*

3 In United States District Court, Southern District of New York

[Title omitted.]

*Complaint*

The plaintiff, by its attorney, Charles H. Tuttle, United States attorney for the Southern District of New York, complaining of the defendant herein, alleges upon information and belief:

First. That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign.

Second. That at all times hereinafter mentioned the defendant, Guaranty Trust Company of New York, was and now is a corporation duly organized and existing under the banking laws of the State of New York for the transaction of business in the city of New York, southern district of New York.

Third. That on or about the 29th day of October 1921 plaintiff drew its check no. 40282540 on the Treasurer of the United
4 States for the sum of one hundred and sixty ($160) dollars, to the order of Louis Macakanja, a photostat copy of which check is hereto attached and marked "Plaintiff's Exhibit A", and thereupon forwarded same by mail to the said Louis Macakanja at 37 Sasava Kot Glina, Z. J. Maja, Jugoslavia SHS.

Fourth. That the said Louis Macakanja, the payee of said check, nor anyone on his behalf, ever received or endorsed the same.

Fifth. That the letter containing said check was taken or received in Jugoslavia by some person other than the payee thereof, and that thereafter the name of Louis Macakanja was written on the back of the said check by some person other than the payee thereof, and by a person who was not authorized to sign the name of the said payee, and who had no right, title, or interest in or to said check, with possession thereof, and no right or authority to receive, endorse, or dispose of same.

Sixth. That the aforementioned check was endorsed by various parties and as a result of said indorsements said check contained a guarantee of all prior endorsements, as more fully appears from the photostat copy of said check and endorsements thereon, attached hereto and made a part of this complaint and hereinabove referred to as exhibit A.

Seventh. That by virtue of all the endorsements hereinbefore mentioned, all of the said endorsers warranted and guaranteed that
5 all prior endorsements were genuine and that each had full authority to make the endorsements aforesaid, and each thereby agreed that it would indemnify the United States of America against any loss occasioned by any such endorsement if made without authority.

Eighth. That the said check was subsequently presented to the plaintiff by the defendant for payment and the plaintiff thereupon paid the defendant the full amount of said check.

Ninth. That the name "Louis Macakanja" endorsed on said check was forged; that the defendant had no right, title, or interest of, in or to said check, or to the possession thereof, and no right or authority to collect the same.

Tenth. That by reason of the forged endorsement of the payee's name on the check hereinbefore mentioned, the plaintiff has been damaged in the sum of one hundred and sixty ($160) dollars, payment of which has been duly demanded and refused.

Wherefore, plaintiff demands judgment against the defendant herein for the sum of one hundred and sixty ($160) dollars, with interest thereon from the 29th day of October 1921, together with the costs and disbursements of this action.

CHARLES H. TUTTLE,
*United States Attorney, Attorney for Plaintiff,*
*Office and P. O. Address, U. S. Courts and P. O. Bldg.,*
*Borough of Manhattan, City of New York.*

6 [*Duly sworn to by Mario G. di Pirro; jurat omitted in printing.*]

7 *Recital re Exhibit A to complaint*

Photostatic copy of check drawn by plaintiff on the Treasury of the United States in the sum of one hundred and sixty dollars ($160) dated October 29, 1921, bearing no. 4028254, to the order of Louis Macakanja.)

[A photostatic copy of the above check appears in this record under the heading of "Plaintiff's Exhibit No. 2" in the bill of exceptions.]

In United States District Court

[Title omitted.]

*Answer*

Defendant Guaranty Trust Company of New York, by its attorneys, Davis, Polk, Wardwell, Gardiner & Read, for its answer to the complaint herein, alleges as follows:

First. Denies that it has any knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraphs fourth and fifth of the complaint.

8 Second. Denies that it has any knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in paragraph third of the complaint, except that on or about the 29th day of October, 1921, plaintiff drew its check no. 40282540, on the Treasurer of the United States, for the sum of one hundred and sixty dollars ($160), to the order of Louis Macakanja, a photostatic copy of said check being attached to the complaint and marked "Exhibit A."

Third. Denies the allegations and each of them contained in paragraph seventh of the complaint.

Fourth. Denies the allegations and each of them contained in paragraph ninth of the complaint, except that defendant denies knowledge or information sufficient to form a belief as to the allegation that the name "Louis Macakanja" endorsed on said check was forged.

Fifth. Denies the allegations and each of them contained in paragraph tenth of the complaint, except that defendant admits that payment has been demanded and refused.

Further answering the complaint and as an affirmative defense to the alleged cause of action set forth in the complaint defendant alleges upon information and belief as follows:

Sixth. That the said check was negotiated and transferred in the Kingdom of Jugo-Slavia.

9 Seventh. Under the law of Jugo-Slavia, upon the negotiation and transfer of a check every transferee, if he gives valuable consideration and takes without actual notice of any alleged forgery or other defect, in the absence of fraud or gross negligence, obtains a good title to the instrument, even if the endorsement of the payee is forged, and acquires the right to collect and retain the proceeds.

Eighth. That the provisions of the law of JugoSlavia set forth in this answer by defendant were in force and effect at the times said check was negotiated and transferred and collected and are still in force and effect.

Ninth. Each of the transferees of the check mentioned in the complaint, gave valuable consideration and took without notice of any alleged forgery or other defect, and without fraud or negligence, and thereby obtained a good title to the instrument and acquired the right to collect and retain the proceeds.

Tenth. Defendant, under the law of JugoSlavia, duly obtained title to said check, as aforesaid, and duly collected and retained the proceeds.

Wherefore, defendant demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

DAVIS, POLK, WARDWELL, GARDINER & REED,
*Attorneys for Defendant.*,
*Office & P. O. Address, 15 Broad Street, Borough of Manhattan, city of New York.*

10 [*Duly sworn to by Arthur C. Vogt, jurat ommitted in printing.*]

11 In United States District Court For the Southern District of New York

Before Hon. Francis G. Caffey, J., and a jury of one

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT

*Bill of exceptions*

NEW YORK, *May 15, 1933.*

*Appearances*

George Z. Medalie, United States attorney, attorney for plaintiff, by G. B. Schoonmaker, of counsel.

Davis, Polk, Wardwell, Gardiner & Reed, attorneys for defendant, by Russel S. Coutant and Francis W. Phillips, of counsel.

*Stipulation as to trial*

The parties stipulated that the action could be tried before the court and a jury of one with the same effect as if it were tried with a full jury of twelve. A jury of one was duly impanelled and sworn.

12 The plaintiff introduced in evidence the following stipulation of facts which was marked "Plaintiff's Exhibit No. 1."

*Plaintiff's exhibit no. 1*

United States District Court, Southern District of New York

L. 45—245

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above-entitled action that the following facts are deemed to be true for the purpose of this action:

1. That at all the times hereinafter mentioned the defendant, Guaranty Trust Company of New York, was and now is a corporation duly organized and existing under the banking laws of the State of New York and had and now has a principal office for the transaction of business in the city of New York, Southern District of New York.

2. That at all the times hereinafter mentioned the defendant was and still is a member of the Federal Reserve Bank System in the Second Federal Reserve District.

13 3. Check no. 40282540 was drawn on the Treasurer of the United States, dated October 29, 1921, to the order of Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugoslavia, in the amount of $160, a photostatic copy of which is annexed to the complaint herein, and said check bears the purported endorsement of the payee thereof, made in Jugo-Slavia, and was transferred and delivered to the "Merkur" Bank of Jugo-Slavia, for a valuable consideration, on or about November 30, 1921.

3a. The original or a photostatic copy of the said check may be received in evidence.

4. The said purported endorsement of the said payee on the said check is a forgery.

5. The said check bore the following printed condition on the back thereof:

"NOTICE TO THE PAYEE

"This check must be endorsed in ink or in indelible pencil on the line below by the person in whose favor it is drawn and the name must be spelled exactly the same as it is on the face of the check.

"If endorsement is made by mark (x) it must be witnessed by two persons who can write, giving their place of residence in full.

"_____ _____.

"(Signature)."

14 6. That at all the times hereinafter mentioned the said condition has been and still is printed on Government checks generally.

6a. The following is the English version of what appears on the back of the aforesaid check (including the printed matter set forth in paragraph 5 hereof):

"Form approved by the Comptroller of the Treasury December 17, 1917.

I acknowledge the receipt of the sum of $160 (one hundred sixty dollars).

NOTICE TO THE PAYEE

This check must be endorsed in ink or in indelible pencil on the line below by the person in whose favor it is drawn and the name must be spelled exactly the same as it is on the face of the check.

If endosement is made by mark (x) it must be witnessed by two persons who can write, giving their place of resident in full.

LOUIS MACAKANJA.
(Signature.)

Witnesses:
GEORGE MRDJEN.
STOJAN STOIC.

It is officially certified that the receiver of the money as well as the witnesses, well known to this municipal administration, have in their own handwriting subscribed the foregoing instrument. The holder of this check is identical with the beneficiary thereof.

THE MUNICIPAL ADMINISTRATION OF MAJA,
*November 30, 1921.*

(Stamp of the Municipal Administration of Maja.)

VUJAKLIJA, *Mayor.*

"Merkur" Banking and Exchange Business, Stanko Shon, Zagreb

Pay to the order of Guaranty Trust Co. of New York, New York City, N. Y.

SLAVENSKA BANK D. D. ZAGREB,
(——— ———)
(Signatures of officials of the Slavenska Bank).

6b. The stamped endorsement of Guaranty Trust Company of New York also appears on the back of the check, together with the stamp of the Federal Reserve Bank of New York.

7. The said "Merkur" Bank received the said check in good faith, and took the same without actual notice of the forgery in the endorsement of the payee or any other defect, and the said "Merkur" Bank in taking said check was not guilty of any fraud or negligence.

16 8. The transfer of the said check as set forth in the foregoing paragraphs, numbers 3 and 7, took place in the Kingdom of Jugo-Slavia.

9. Shortly thereafter, and prior to or on December 3, 1921, the said "Merkur" Bank duly endorsed the said check, and transferred and delivered the same to the "Slavenska" Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration.

10. The said "Slavenska" Bank received the said check in good faith and took the same without actual notice of the forgery in the endorsement of the payee or any other defect, and the said "Slavenska" Bank in taking the said check was not guilty of any fraud or negligence.

11. The transfer of the said check, mentioned in the foregoing paragraphs, numbers 9 and 10, took place in the Kingdom of Jugo-Slavia.

12. On or about December 3, 1921, the said "Slavenska" Bank, for value received, duly endorsed the said check to the order of the Guaranty Trust Company of New York, the defendant herein, and on the same day forwarded the said check to the said defendant by mail.

12a. The said Guaranty Trust Company of New York received the aforesaid check by mail from the Slavenska Bank on or about December 21, 1921, in good faith and took the same without actual notice of the forgery in the endorsement of the payee thereof or any other defect, and the said Guaranty Trust Company of
17 New York in taking the said check was not guilty of any fraud or negligence.

13. The endorsement on the said check, as set forth in the foregoing paragraph numbered 12, was made in the Kingdom of Jugo-Slavia.

14. The law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange is as follows:

"Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where

"(a) The instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and

"(b) The said transferee, holder or endorsee gives valuable consideration for the instrument; and

"(c) The said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument:

"The law of Jugo-Slavia further provides that

18 "(a) When an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and

"(b) The transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

"Under the law of Jugo-Slavia, an endorser does not guarantee or warrant the genuineness of prior endorsements.

"The law, as above stated, was in 1921 and still is in full force and effect in Jugo-Slavia."

15. That the defendant, upon receipt of the said check, stamped upon the back thereof "Previous endorsements guaranteed" and then presented the check to the Federal Reserve Bank of New York for collection.

16. That circular number 258, of the Federal Reserve Bank of New York, effective from March 1, 1920, until April 1, 1922, contained the following rules and regulations:

"GOVERNMENT CHECKS

"Member banks of this district, other than members of the New York Clearing House Association, may include in their remittances to the Federal Reserve Bank of New York for immediate
19 credit at par, but subject to final payment by the Treasurer of the United States, all Government warrants and checks drawn on the Treasurer of the United States.

"In New York City member banks may send Government warrants and checks to the Federal Reserve Bank through the clearing house subject to final payment by the Treasurer of the United States.

"The Government has for many years exercised the right of returning at any time warrants and checks which for any cause have not been considered good, and the Federal Reserve Bank of New York as fiscal agent of the United States as a condition of receiving Government warrants and checks on the Treasurer of the United States from member banks or through the New York Clearing House reserves the right to charge back any such item and return the same at any time unconditionally to the institution from which it was received.

"CONDITIONS GOVERNING THE USE OF THE SYSTEM

"Every bank sending checks or other cash items to the Federal Reserve Bank of New York or to another Federal Reserve bank direct will be understood to have agreed to the terms and conditions herein set forth and to have thereby specifically agreed that in receiving such items the Federal Reserve Bank of New York will act only as the colleting agent of the sending bank, will
20 assume no responsibility other than for due diligence and care in forwarding such items promptly, and will be authorized to send such items for payment direct to the bank on which they are drawn, or, at its discretion, to another agent for collection.

"The right is reserved to withdraw, add to, or amend at any time or from time to time any or all of the foregoing rules and regulations with or without previous notice."

17. The defendant had knowledge of the rules and regulations contained in the said circular number 258 and the said circular was in force at the time the defendant presented the said check to the Federal Reserve Bank of New York.

18. That upon receipt of the said check the Federal Reserve Bank of New York sent the said check to the Treasurer of the United States for payment.

19. That at the time mentioned in paragraph 18 hereof Treasury Department Circular No. 176, dated December 31, 1919, was in effect and contained the following regulations governing the deposit of public moneys and payment of Government warrants and checks:

"PAYMENT OF GOVERNMENT WARRANTS AND CHECKS

"29. Federal Reserve banks and branches: Federal Reserve
21 banks and branches shall make arrangements to cash Government warrants and checks drawn on the Treasurer of the United States for disbursing officers of the War Department and Navy Department and other Government officers, provided that satisfactory identification of the officer shall be furnished. The Treasurer will upon special request advise Federal Reserve banks and branches as to the balances to the credit of such officers. Each Federal Reserve bank and branch will cash Government warrants and checks drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible incorporated banks and trust companies who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Warrants and checks cashed by Federal Reserve banks and branches shall be charged to the account of the Treasurer of the United States, subject to examination and payment by the Treasurer. Federal Reserve banks and branches will not be expected to cash Government warrants and checks presented direct to the bank by the general public.

"30. National bank depositaries and assistant treasurers: Each regular national bank depositary with an authorized balance to the credit of the Treasurer of the United States, and each Assistant Treasurer of the United States will cash Government war-
22 rants and checks drawn on the Treasurer of the United States when they are presented and properly indorsed by responsible holders who guarantee all prior indorsements thereon, including the indorsement of the drawer when the check is drawn in his favor. Warrants and checks so cashed by Assistant Treasurers shall be charged to the account of the Treasurer of the United States, subject to examination and payment thereof by the Treasurer. Regular national bank depositaries are not required to charge Government warrants and checks cashed by them in the account of the Treasurer of the United States, except in cases where checks drawn on the Treasurer of the United States are deposited for the official credit of the drawer or the credit of other Government officers in the account of the Treasurer of the United States and in cases where cash is furnished to a Government officer upon the warrant or check for pay roll or other expenditures.

"31. Payment by Treasurer: The Treasurer of the United States reserves the usual right of the drawee to examine, when received, all Government warrants and checks cashed by Assistant Treasurers, Federal Reserve banks and branches, and national bank depositaries and to refuse payment thereof. Three years after the close of the fiscal year (June 30) in which they are drawn, warrants and dis-

bursing officer's checks are not payable by the Treasurer of
23 the United States, but should be sent to the Secretary of the Treasury, Division of Public Moneys, for payment from the 'outstanding liabilities appropriation.'"

20. That on or about January 12, 1922, S. P. Gilbert, Jr., Under Secretary of Treasury of the United States, sent the following letter to the defendant, Guaranty Trust Company of New York, in reference to the aforesaid Circular No. 258 of the Federal Reserve Bank of New York and to the aforesaid Treasury Department Circular No. 176:

THE UNDER SECRETARY OF THE TREASURY,
*Washington, January 12, 1922.*

The GUARANTY TRUST COMPANY,
*140 Broadway, New York City.*

SIRS: The State Department advised the Treasury under date of December 10, 1921, that the American consul general at Warsaw, Poland, reported that the Polish State Loan Bank had refused to purchase or accept certain United States Government checks because of information received by it from its New York correspondents to the effect that "the Government of the United States and the offi-
cers thereof reserve the right to charge back at any later date
24 any instruments which they have previously paid." Further advice is now received from the State Department that the Guaranty Trust Company is one of the New York correspondents of the Polish State Loan Bank referred to.

Within the past two months difficulty has been experienced in the cashing of checks drawn upon the Treasurer of the United States not only in Poland but also in Vienna and various parts of England. The reason assigned in each case is that information to the same effect as that quoted above has been received from the bank's New York correspondent. As the situation was causing considerable embarrassment and even hardship to representatives of this Government, the matter was taken up with another New York bank which was reported to have furnished information quoted above and with the Federal Reserve Bank of New York, upon whose Circular No. 258 of March 1, 1920, the statement was understood to have been based. As a result the Federal Reserve Bank of New York has undertaken a revision of the Circular No. 258, eliminating the paragraph which had given rise to misunderstanding of the true practice of the Treasurer of the United States with regard to the return of Government checks, and the New York bank in question agreed to omit stamping the objectionable advice upon Government items.

In view of these facts and inasmuch as the practice of the
25 Treasury Department with regard to the return of checks drawn upon the Treasurer of the United States as now estab-

lished is in accordance with commercial practice, I trust that, if it has been the practice, as reported, of your bank to advise foreign correspondents that the Government of the United States and the officers thereof reserve the right to charge back at any later date any instruments which they have previously paid, it will be possible to make immediate modification of this practice, so as to make the treatment of checks drawn upon the Treasurer of the United States conform to the practice with regard to the treatment of commercial items.

It is true that Government warrants and checks, inasmuch as they are drawn upon the Treasurer of the United States, are subject to final payment by the Treasurer and that the Treasurer reserves the usual right of the drawee to examine, when received, all Government checks cashed by Federal Reserve bank or branches or national bank depositaries and refuse payment thereon as set forth in paragraphs 29 to 31, Treasury Department Circular No. 176, dated December 31, 1919, a copy of which is enclosed. Immediate examination is made in accordance with commercial practice and checks are returned only in case of no funds, forgery, raising or other material defects for which checks are returned by drawee banks under commercial practice, and consequently there is no reason whatever for discrim-
26 ination by the Polish State Loan Bank or any foreign or domestic bank against United States Government checks, upon the grounds reported.

By direction of the Secretary.

Respectfully,

S. P. GILBERT, Jr.,
*Under Secretary.*

21. That the defendant, at the time it presented the said check to the Federal Reserve Bank of New York, had knowledge of the regulations contained in the Treasury Department Circular Number 176.

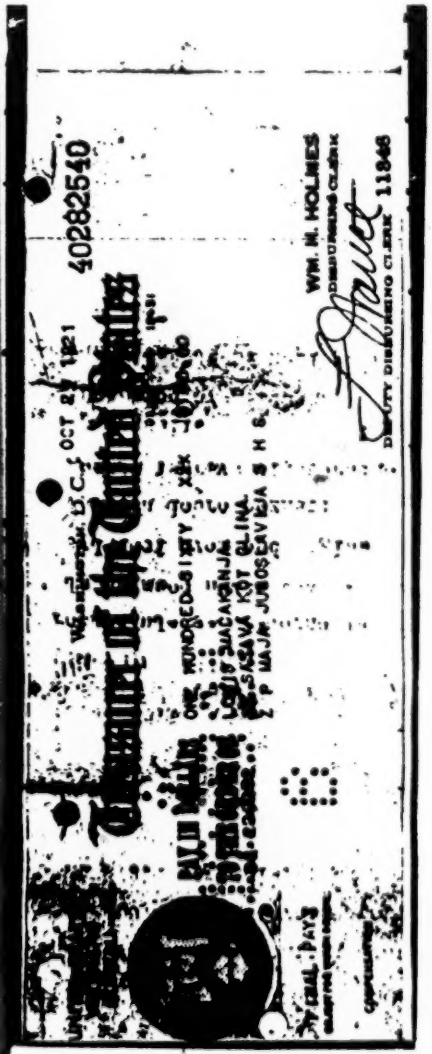
22. That the Treasurer of the United States, upon receipt of the said check, paid the same by crediting the Federal Reserve Bank of New York with the amount of said check.

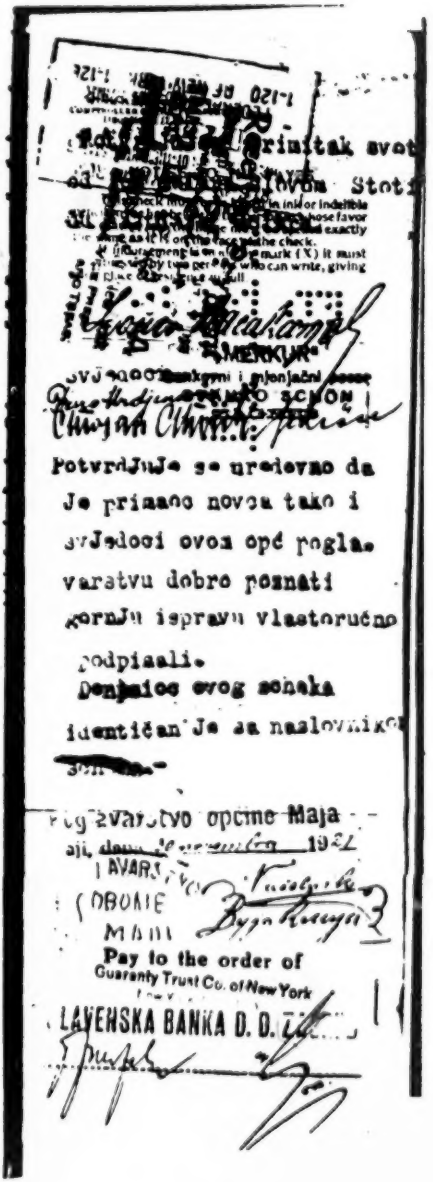
23. That the Federal Reserve Bank of New York credited the defendant with the amount of the said check in December 1921.

24. That thereafter and on or about April 27, 1926, the plaintiff first ascertained that the payee's signature on the said check was forged and immediately thereafter and on the 1st day of June 1926, requested reclamation through the Federal Reserve Bank of New York, from the defendant.

25. That thereafter the defendant denied liability.

PLAINTIFF'S EXHIBIT No. 2



27 26. That thereafter this suit was brought.

Dated New York, N. Y., March 1, 1933.

GEORGE Z. MEDALIE,
*United States Attorney, Attorney for Plaintiff.*
DAVIS, POLK, WARDWELL, GARDINER & REED,
*Attorneys for Defendant.*

The plaintiff introduced in evidence a photostatic copy of the check involved in the suit which was marked "Plaintiff's Exhibit No. 2." Both sides then rested.

*Motions for directed verdict*

The plaintiff moved for a directed verdict.

The defendant moved for a directed verdict.

The court directed a verdict in favor of the plaintiff for $160 with interest from June 1, 1926, and denied the defendant's motion for a directed verdict, to which the defendant duly took an exception.

PLAINTIFF'S EXHIBIT NO. 1

(This exhibit consists of a stipulation of facts signed by the attorneys for the respective parties in this action dated March 1, 1933, and is set forth in full above.)

29 In United States District Court

[Title omitted.]

*Stipulation settling bill of exceptions*

It is hereby stipulated and agreed by and between the attorneys for the respective parties above named that the foregoing bill of exceptions upon the trial before Honorable Francis G. Caffey, together with the foregoing exhibits annexed thereto, is a true and correct record of the proceedings upon said trial, containing and including the said exhibits and all of the evidence admitted thereupon, and that the same may be settled, made and filed as such bill of exceptions without further notice.

Dated New York, N. Y., July 17, 1933.

GEORGE Z. MEDALIE,
*United States Attorney, Attorney for Plaintiff.*
DAVIS, POLK, WARDWELL, GARDINER & REED,
*Attorneys for Defendant.*

30 In United States District Court

[Title omitted.]

*Order settling bill of exceptions*

Upon reading the annexed stipulation, it is hereby ordered that the foregoing bill of exceptions be and hereby is settled, made and filed as the bill of exceptions herein of the proceedings upon the trial before the undersigned United States district judge, and that the same contains with the annexed exhibits all of the evidence admitted upon said trial, and it is hereby ordered on file.

Dated New York, N. Y., July 17, 1933.

FRANCIS G. CAFFEY,
*U. S. D. J.*

31 In United States District Court, Southern District of New York

L. 45/245

UNITED STATES OF AMERICA, PLAINTIFF
*v.*
GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT

*Opinion, Caffey, D. J.*

The condition of the calendar is such that it would be well nigh inexcusable to postpone decision until time can be found for preparation of a memorandum fully discussing the numerous interesting

questions involved. Moreover, a statement by a trial judge of that type would do no good in a case, such as this, in which both parties are amply able to appeal and, until final determination by an appellate court, continuance of uncertainty as to the governing law is inevitable. Accordingly, I have confined myself to reaching a conclusion as to what I think the result should be.

A verdict will be directed in favor of the plaintiff for $160, with interest from June 1, 1926, the date of demand. The defendant may have an exception.

FRANCIS G. CAFFEY,
*United States District Judge.*

Dated May 22, 1933.

32 In United States District Court, Southern District of New York

L. 45–245

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT

*Judgment*

The issues in this case having been regularly brought on for trial before the Honorable Francis G. Caffey, district judge, and a jury of one, at a stated term of this court held on the 15th day of May 1933, in the Woolworth Building, Borough of Manhattan, city of New York, and the plaintiff appearing by George B. Schoonmaker, assistant United States attorney, of counsel, and the defendant appearing by Russel S. Coutant, Esq., of counsel, and the allegations and proofs on behalf of the plaintiff and the defendant having been heard and considered and thereafter at the close of the testimony for both sides, the counsel for the plaintiff having moved for the direction of a verdict in favor of the plaintiff and the counsel for the defendant having moved for the direction of a verdict in favor of the defendant and thereafter the Court having directed a verdict in favor of the plaintiff for the sum of $160.00, with interest from June 1, 1926, and the jury having returned a verdict for the plaintiff for $160.00 with interest from June 1, 1926, in accordance with the direction of the Court and the plaintiff's costs having been taxed in the sum of $32.12.

33 Now on motion of George Z. Medalie, United States Attorney for the Southern District of New York, on behalf of the plaintiff, it is

Ordered and adjudged that the United States of America, the plaintiff herein, have and recover of the Guaranty Trust Company of New York, the defendant herein, the sum of $160.00, with interest

from June 1, 1926, being in the sum of $67.20 and the further sum of $32.12 costs as taxed, making a total sum of $259.32, and that the plaintiff have execution therefor.

Judgment signed this 1st day of June 1933.

CHARLES WEISER, *Clerk.*

In United States District Court

[Title omitted.]

*Petition for appeal*

*To the honorable the Judges of the United States District Court for the Southern District of New York:*

Now comes Guaranty Trust Company of New York, de-
34 fendant above named, and says that on or about the 1st day of June 1933, this court entered judgment herein in favor of the plaintiff and against this defendant, which judgment ordered and adjudged that plaintiff recover of defendant the sum of $227.20, besides the costs of this action taxed at $32.12, and have execution therefor; and that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear in the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that an order may issue in its behalf allowing defendant to appeal to the United States Circuit Court of Appeals for the Second Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the aforesaid Circuit Court of Appeals.

Your petitioner submits herewith good and sufficient bond securing the payments of costs and further prays for an order approving the said bond.

Dated New York, N. Y., July 10, 1933.

DAVIS, POLK, WARDWELL, GARDINER & REED,
*Attorneys for Defendant,*
*Office and Post Office Address: 15 Broad Street,*
*Borough of Manhattan, New York, N. Y.*

35 In United States District Court

[Title omitted.]

*Order Allowing Appeal—July 10, 1933*

Defendant above named having prayed for the allowance of an appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment made and entered in the above entitled

cause by the United States District Court for the Southern District of New York on June 1, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of said Circuit Court of Appeals for the Second Circuit in such case made and provided;

It is now here ordered that an appeal be and the same hereby
36 is allowed in this cause to the United States Circuit Court of Appeals for the Second Circuit from said District Court in the manner and to the extent prayed and as provided by law; and it is

Further ordered that the clerk of said District Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit the same under the seal of this court to the United States Circuit Court for the Second Circuit, so that he shall have the same in said court within thirty days of this date; and it is

Further ordered that the bond for costs submitted herein by the defendant be, and the same hereby, is approved.

HENRY W. GODDARD,
*U. S. D. J.*

In United States District Court

[Title omitted.]

*Assignment of errors*

Now comes Guaranty Trust Company of New York, the defendant above named, and in connection with its petition for allowance
37 of an appeal herein, files the following assignment of errors upon which said defendant will rely in prosecution of the said appeal from the judgment of this court entered on the first day of June 1933:

First. The court erred in directing a verdict in favor of the plaintiff.

Second. The court erred in failing and refusing to direct a verdict in favor of the defendant.

Third. The court erred in failing and refusing to find that a "warranty of prior endorsements" is nothing more than a warranty that the prior endorsements on the check involved are sufficient to pass title, and that such a warranty is merely a warranty of the good title of the holder in the check.

Fourth. The court erred in failing and refusing to find that the theory of an action of this type is that money has been paid out under a mistake of fact, and in reliance upon a warranty of good title, to a person who has no right to receive the same since that person actually has no title in the check, and that, therefore, the primary question to be determined in such an action is whether the defendant had good title to the check at the time of payment.

Fifth. The court erred in failing and refusing to find that the defendant had good title to the check involved in this action when the defendant presented the same for payment to Federal
38 Reserve Bank of New York, as fiscal agent of the plaintiff, and was justified in retaining the proceeds thereof.

Sixth. The court erred in failing and refusing to find that the said check was negotiated and transferred to the defendant in the Kingdom of Jugo-Slavia.

Seventh. The court erred in failing and refusing to find that the law of the Kingdom of Jugo-Slavia, rather than the American common law, as embodied in the negotiable instruments law, governed the transfer of the said check to the defendant.

Eighth. The court erred in failing and refusing to find that the defendant obtained a good title to the said check under the law of the Kingdom of Jugo-Slavia.

Ninth. The court erred in applying the American common law, as embodied in the negotiable instruments law, instead of the law of the Kingdom of Jugo-Slavia, to determine whether the defendant had a good title to the said check.

Tenth. The court erred in failing and refusing to find that the defendant, in taking the said check, acquired the same title which its transferor, the "Slavenska" bank had in the said check.

Eleventh. The court erred in failing and refusing to apply the rule that the transfer of a negotiable instrument, and the
39 rights obtained by a transferee thereof, are governed by the law of the place of the transfer.

Twelfth. The court erred in failing and refusing to find that the "Merkur" bank obtained a good title to the check involved in this action when the same was transferred to the said bank in the Kingdom of Jugo-Slavia.

Thirteenth. The court erred in failing and refusing to find that the "Slavenska" bank obtained a good title to the check involved in this action when the same was transferred to the said bank in the Kingdom of Jugo-Slavia.

Wherefore, defendant prays that the said judgment of the United States Court for the Southern District of New York in said cause be reversed, and judgment be rendered in favor of said defendant, with costs.

DAVIS, POLK, WARDWELL, GARDINER & REED,
*Attorneys for Defendant,*
*Office & post office address: No. 15 Broad Street,*
*Borough of Manhattan, City of New York.*

40 [Citation in usual form omitted in printing.]

41 In United States District Court

[Title omitted.]

*Stipulation as to record*

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said district court in the above cause as agreed upon by the parties.

Dated New York, N. Y., July —, 1933.

GEORGE Z. MEDALIE,
*United States Attorney,*
*Attorney for plaintiff-respondent.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
***Attorneys for defendant-appellant.***

42 [Clerk's certificate to foregoing transcript omitted in printing.]

43 In United States Circuit Court of Appeals for the Second Circuit

No. 117. October term, 1933

Argued January 11, 1934. Decided March 12, 1934

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
*v.*
GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Southern District of New York.

Before Manton, Augustus N. Hand, and Chase, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York in favor of the plaintiff in an action at law. Reversed.

Martin Conboy, United States Attorney, and George B. Schoonmaker, Assistant United States Attorney, both of New York City.

Davis, Polk, Wardwell, Gardiner & Reed, of New York City (Russel S. Coutant and Francis W. Phillips, both of New York City, of counsel), for appellant.

*Opinion*

CHASE, *Circuit Judge:*

The defendant presented to the Federal Reserve Bank at New York a check drawn on the Treasurer of the United States on October 29, 1921, and payable to the order of Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugo-Slavia, and received credit for it. The check then was indorsed in the name of the payee. The Federal Reserve Bank of New York presented the check to the Treasurer of the United States, who paid it by giving the Federal Reserve bank credit for it in December 1921.

About April 27, 1926, the plaintiff learned that the payee's indorsement on the check was forged, and thereupon demanded reimbursement from the defendant of the money it paid upon presentment of the check. Upon denial by the defendant of liability, this suit was brought.

The essential facts were stipulated, and are that the indorsement of the payee was forged in Jugo-Slavia where the check was then transferred and delivered to the Merkur Bank which took it without notice of the forgery and for a valuable consideration on or about November 30, 1921. This bank acted in good faith and without negligence. It indorsed and transferred the check to the Slavenska Bank D. D. Zagreb, in Jugo-Slavia, for a valuable consideration. The Slavenska Bank acted in good faith without notice of the forgery and without negligence. This bank indorsed the check in Jugo-Slavia to the order of the defendant on or about December 3, 1921, and forwarded it to the defendant in New York. The defendant received it on or about December 21, 1921, and took it for value in good faith without notice of the forgery and without negligence.

It was stipulated that:

"The law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange is as follows:

"Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where

"(a) The instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and

44 "(b) The said transferee, holder or endorsee gives valuable consideration for the instrument; and

"(c) The said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument.

"The law of Jugo-Slavia further provides that

"(a) When an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and

"(b) The transferee, holder, or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

"Under the law of Jugo-Slavia, an endorser does not guarantee or warrant the genuineness of prior endorsements.

"The law, as above stated, was in 1921 and still is in full force and effect in Jugo-Slavia."

Before the defendant presented the check for payment it stamped its indorsement upon it with the words "Previous endorsements guaranteed."

It is conceded that, if the forged indorsement had been in this country, subsequent holders of the check would have acquired no title and that the plaintiff could have recovered upon the theory that the defendant had no right to receive payment under the law of the District of Columbia where this check was payable and so had been unjustly enriched. But under the law of Jugo-Slavia the Slavenska Bank had a good title even though the payee's indorsement was forged. By transferring that title to the defendant, it put the defendant in the same position to demand and receive payment that the Slavenska Bank was in when it had the check. The decision, accordingly, turns on whether or not the law of Jugo-Slavia controls and is to be given effect.

This question is certainly not without difficult implications. The cases in which it has arisen are surprisingly few. While it may truly be said that in dealing with commercial paper we are concerned primarily with the obligations of parties to it rather than strictly with title as the term is applied to tangible chattels, the obligations of the parties must nevertheless be dependent upon the title which the holder of the paper has acquired. In deciding what title this defendant had when it presented the check for payment we may have regard to the general rule of law relating to the transfer of title to chattels. The analogy in many respects is close. It is clear that the validity of a transfer of title to chattels is governed by the law of the country in which the transfer takes place. Banque de France v. Chase Nat. Bank of City of New York (C. C. A. 2) 60 F. (2d) 703. The rule has been applied to the transfer of stock certificates, Direction Der Disconto-Gesellschaft v. U. S. Steel Co., 267 U. S. 22, 45 S. Ct. 207, 69 L. Ed. 495; New York Trust Co. v. Island Oil & Transport Co. (C. C. A.) 33 F. (2d) 104, 79 A. L. R. 1007; and to the transfer of promissory notes; Brook v. Vannest, 58 N. J. Law, 162, 33 A. 382; Mackintosh v. Gibbs, 81 N. J. Law, 577, 80 A. 554, Ann. Cas. 1912D, 163; Dundas et al. v. Bowler et al., 8 Fed. Cas. 30, no. 4,141. In Guernsey v. Imperial Bank of Canada (C. C. A.) 188 F. 300, 40 L. R. A. (N. S.) 377, it was recognized that the indorsement of commercial paper is an independent contract whose validity depends upon compliance with the law at the place of indorsement. See also, McClintick v. Cummins, 15 Fed. Cas. 1272, no. 8,699; Minor Conflict of Laws, § 165; Tentative Restatement of Conflict of Laws, American Law Institute, § 282.

This check was sent by the maker to Jugo-Slavia. It is apparent that its transfer by indorsement and delivery in that country was to be expected. There is no discernible hardship in applying the general rule above set forth and testing the title acquired by transferees by the law of that country. Nor does the fact that the payee's indorsement was forged require us to take a different attitude. Prof.

Lorenzen, in the Conflict of Laws Relating to Bills and Notes, discusses this question at pages 139 and 140, and, after pointing out that the Anglo-American law and that of the continental countries reflect different views as to whether "the owner of a negotiable instrument whose signature has been forged or whether the party who in good faith acquired such instrument should be protected", reaches the conclusion that it is all merely a question of commercial policy, and that no moral issues are involved which would prevent our enforcing the continental rule. He says further, "In the opinion of the author the uniform act should provide that each
45 party be held if the holder of the instrument has acquired title in accordance with the municipal law of the State where such party's contract was made, but that title acquired in conformity with the law of the place of transfer shall be recognized with respect to all parties." To this we agree, and do so the more readily because in England, where forged indorsements are treated as they are with us, the question here presented was decided in the case of Embiricos v. Anglo-Austrian Bank, 1 L. R. (1905) 1 K. B. 677. A check was drawn in Roumania on a bank in London where it was payable to the plaintiffs who indorsed the check in Roumania specially to a London firm. It was then stolen and presented to a bank in Vienna, Austria, with the forged indorsement of the London firm to which it had been made payable by the special indorsement, and the Vienna bank cashed it in good faith without notice of the forgery. The Vienna bank indorsed it to a bank in London to which the check was at once sent by mail. It was unanimously held in the English Court of Appeal that the validity of the transfer to the Vienna bank should be determined in accordance with the law of Austria. To like effect is the decision in Alcock v. Smith (1892) 1 Ch. 238. And this rule is recognized in New York also. In Weissman et al. v. Banque de Bruxelles, 254 N. Y. 488, 173 N. E. 835, 837, Judge Pound said: "The rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of checks or bills of exchange by indorsement." Compare Hutchinson v. Ross, 262 N. Y. 381, 187 N. E. 65.

The action of the defendant in stamping the statement "Previous endorsements guaranteed" on the check before presenting it for payment is urged as a basis of recovery. Ordinarily such a warranty means that the indorser warrants that previous indorsements are genuine and payment made in reliance upon the warranty may be recovered upon proof that such an indorsement is not. Onondaga County Savings Bank v. U. S. (C. C. A. 2) 64 F. 703; United States v. National Exchange Bank, 214 U. S. 302, 29 S. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184; Farmers' State Bank v. United States (C. C. A.) 62 F. (2d) 178. But this is so when previous indorsements must be genuine to give a good title to the one who guarantees

them. The guaranty is one of the title rather than of authentic penmanship or its equivalent. When, as here, the indorsements are of the same sufficiency in law that they would be if all were genuine, the warranty is in accord with the legal situation, and there is no breach.

Judgment reversed.

46 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE

*v.*

GUARANTY TRUST COMPANY OF NEW YORK, DEFENDANT-APPELLANT

*Judgment filed March 19, 1934*

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

WM. PARKIN, *Clerk.*

47 [File endorsement omitted.]

48 [Clerk's certificate to foregoing transcript omitted in printing.]

49 Supreme Court of the United States

*Order allowing certiorari*

Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

File No. 38748. U. S. Circuit Court of Appeals, Second Circuit. Term No. 120. The United States of America, petitioner, *v.* Guaranty Trust Company of New York. Petition for a writ of certiorari and exhibit thereto. Filed June 19, 1934. File No. 120 O. T. 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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66905—34

# In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

GUARANTY TRUST COMPANY OF NEW YORK

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case March 19, 1934, reversing the judgment of the District Court of the United States for the Southern District of New York.

**OPINIONS BELOW**

The opinion of the District Court (R. 31) is not reported. The opinion of the Circuit Court of Appeals (R. 43) is reported in 69 F. (2d) 799.

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered March 19, 1934. (R. 46.) The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether in the case of a check drawn and payable in this country to a foreign payee, and transferred under a forged endorsement in the foreign country, the rights and obligations of the drawer-drawee and of a subsequent American endorsee are governed by the laws of the foreign country of transfer, or by the laws of the American jurisdiction in which the check was both drawn and payable.

2. Whether the last endorsement made in New York on such check, "previous endorsements guaranteed", imports a guarantee of the genuineness of the prior endorsements as well as a guarantee of title.

## STATUTES INVOLVED

These are set forth in the Appendix, *infra,* pp. 11–12.

## STATEMENT

The case was presented in the District Court on stipulated facts (R. 12–28), which may be summarized as follows:

A check in the amount of $160, dated October 29, 1921, was drawn in Washington on the Treasurer of the United States, to the order of Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugo-Slavia, and mailed to the payee. (R. 13.) The

check bears the purported endorsement of the payee made in Jugo-Slavia, and was transferred and delivered to the Merkur Bank of Jugo-Slavia for a valuable consideration on or about November 30, 1921. (R. 13.) The purported endorsement of the payee is a forgery. (R. 13.) The Merkur Bank received the check in good faith and without being guilty of any negligence (R. 15), and thereafter duly endorsed the check and transferred and delivered it to the Slavenska Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration. (R. 16.) The Slavenska Bank received the check in good faith and without notice of the forgery. (R. 16.) On or about December 3, 1921, the Slavenska Bank endorsed and mailed the check to the defendant, which received it on or about December 21, 1921, in good faith for value and without notice of the forgery. (R. 16–17.) The respondent, upon receipt of the check, stamped its endorsement on the back and presented it to the Federal Reserve Bank of New York for collection. The respondent's endorsement contained the words "previous endorsements guaranteed." (R. 18.) The Federal Reserve Bank sent the check to the Treasurer of the United States for payment. (R. 20.) Upon receipt of the check the Treasurer of the United States paid it by crediting the Federal Reserve Bank of New York with the amount and the Federal Reserve Bank of New York in turn credited the amount to the respondent.

(R. 26.) It was later discovered that the payee's endorsement was forged, and the petitioner thereupon requested reclamation, through the Federal Reserve Bank of New York, from the respondent. (R. 26.)

The law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange is as follows (R. 17–18):

> Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where
>
> (a) the instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and
>
> (b) the said transferee, holder or endorsee gives valuable consideration for the instrument; and
>
> (c) the said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument:

The law of Jugo-Slavia further provides that

> (a) when an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and

(b) the transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

Under the law of Jugo-Slavia an endorser does not guarantee or warrant the genuineness of prior endorsements.

The law, as above stated, was in 1921 and still is in full force and effect in Jugo-Slavia.

The District Court entered judgment in favor of the petitioner for the amount of the check and interest. (R. 32.) The Circuit Court of Appeals reversed.

### SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the law of the place of foreign transfer governs the rights of an endorsee as against the drawer-drawee of an American check.

3. In holding that the respondent's title to the check, although acquired under a forged endorsement, authorized the respondent to demand and receive payment of the check in this country.

4. In holding that respondent's endorsement, "previous endorsements guaranteed," was a guarantee of title merely, and not of the genuineness of prior endorsements.

### REASONS FOR GRANTING THE WRIT

1. The question involved is one of public importance the proper solution of which is in doubt.

Many checks drawn on the Treasurer of the United States by various disbursing officers, and innumerable others drawn by private individuals on various banks throughout the United States, are sent annually to payees residing in European countries in which the civil law and not the common law, or law merchant, prevails. The question is whether in such a case a title acquired abroad under a forged endorsement is good in the United States, and will be enforced against the drawer-drawee although contrary to the law of the American jurisdiction where the check was both drawn and payable. The question has never been passed upon by this Court.

2. The decision of the Circuit Court of Appeals is believed to be erroneous.

It is, of course, admitted that under the law of Jugo-Slavia the Merkur Bank acquired title to the check and could hold it, in Jugo-Slavia, against the rightful owner. The question is not simply whether a title so acquired will be honored in this country, but whether it creates an obligation in the American drawer-drawee to make payment, in this country, to a successor of the holder of that title, and whether a subsequent American endorsement, "prior endorsements guaranteed", has any meaning.

## I

The law governing the drawer-drawee's contract is the law of the District of Columbia and any subsequent transfer cannot alter these obligations, and

the drawer-drawee remains at all times under the same liability it was under at the time the check was drawn. *Robertson* v. *Burdekin,* 6 Dunlop 17 (Court of Session).

The check was both drawn and payable in the District of Columbia. Where the *lex loci contractus* and the *lex loci solutionis* are identical, there is no question as to what law governs the obligations of a contract. *Hutchison* v. *Ward,* 192 N.Y. 375, 379. The Code of Laws of the District of Columbia (Title 22, Section 24, *infra,* p. 11) provides that where a signature is forged it is wholly inoperative and no right to enforce payment can be acquired under such signature. Section 91 of the same title (*infra,* p. 11) provides that the drawer engages that on due presentment the instrument will be accepted or paid according to its tenor. Although the law of the place of transfer may govern the validity of the transfer and the rights as between the transferees, it cannot enlarge the liability of the drawer-drawee under the laws of a jurisdiction where the check was both drawn and payable. Lorenzen, *The Conflict of Laws Relating to Bills and Notes,* 1919, page 134; *Pritchard* v. *Norton,* 106 U.S. 124, 133; *Orij* v. *Winter,* 4 Martin N.S. (La.) 277.

II

The phrase "previous endorsements guaranteed" is a guarantee of the genuineness of prior endorsements as well as a guarantee of title.

The obligation of the respondent under its contract of endorsement is governed by the law of the place where the contract of endorsement was made, that is, of New York. *Spies* v. *National City Bank,* 174 N.Y. 222, 225. Sections 115 and 116 of the Negotiable Instruments Law of New York (*infra,* pp. 11–12) provide that every endorser who endorses without qualification warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has good legal title to it; and (3) that all prior parties had capacity to contract. If the sole warranty were one of title, there would be no reason for warranties (1) and (3). If an instrument "is genuine and in all respects what it purports to be," the prior endorsements must all be genuine. Where one of the endorsements is forged, the instrument is no longer genuine, for the signatures of all prior parties are inherent factors in the instrument. The holding of the Circuit Court of Appeals amounts to a ruling that all subsections of Section 115 of the Negotiable Instruments Law of New York, except Subsection 2, are mere verbiage. Obviously they are not intended to be such, and the only way in which all the subsections of Section 115 can be given legal significance is to hold that the endorser warrants that all prior signatures, including endorsements, are genuine.

The courts of New York have held, under this section, that an endorser guarantees the genuineness of the signature of prior endorsers. *Packard*

v. *Windholz,* 84 N.Y.Supp. 666, 667, affirmed, 180 N.Y. 549; *Oriental Bank* v. *Gallo,* 98 N.Y.Supp. 561, 563, affirmed, 188 N.Y. 610; *Geering* v. *Metropolitan Bank,* 156 N.Y.Supp. 582, 583, affirmed, 225 N.Y. 711. This Court has followed the same rule without the aid of the statute, *United States* v. *National Exchange Bank,* 214 U.S. 302, 319, as the Court of Appeals of New York did before the statute was passed. *Turnbull* v. *Bowyer,* 40 N.Y. 456, 460. If there were any doubt about the effect, in that respect, of a simple general endorsement, it would seem to be removed by the special stamping "prior endorsements guaranteed." The Treasury Department circular in force at the time (R. 20–23) required that checks on the Treasurer of the United States, presented to Federal Reserve Banks for payment, must be "properly indorsed by responsible incorporated banks and trust companies who guarantee all prior indorsements thereon." The respondent had knowledge of this circular when it dealt with the check in question (R. 26) and the form of its endorsement (if differing at all from that commonly in use by it) was evidently directed to the requirements of the circular. The words "prior endorsements guaranteed" can only mean one thing. They are not a warranty of title, which is warranted by the mere fact of transfer, but are a guarantee of "prior endorsements"; that is, of their genuineness. In the language of the Circuit Court of Appeals, a bank endorsing in this form

warrants "the authenticity of the penmanship" of prior endorsements, quite as much as its own title.

## III

The payee's endorsement having been forged, and the check having been paid under a mistake as to the genuineness of the signature of the payee, the amount of the check is recoverable by the United States from the respondent. *United States* v. *National Exchange Bank,* 214 U.S. 302; *United States* v. *Chase National Bank,* 252 U.S. 485, 493; *First National Bank* v. *Whitman,* 94 U.S. 343.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

J. CRAWFORD BIGGS,
*Solicitor General.*

JUNE 1934.

# APPENDIX

## STATUTES

Title 22, Sections 24 and 91, of the Code of Laws of the District of Columbia provides as follows:

Section 24.

> Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

Section 91:

> The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. * * *

Section 116 of the Negotiable Instruments Law of New York provides as follows:

> Every endorser who indorses without qualification, warrants to all subsequent holders in due course:

(1) The matters and things mentioned in subdivisions one, two and three of the next preceding section; and,

(2) That the instrument is at the time of his endorsement valid and subsisting.

The "matters and things mentioned in subdivisions one, two and three" of Section 115 are as follows:

(1) That the instrument is genuine and in all respects what it purports to be;

(2) That he has a good title to it;

(3) That all prior parties had capacity to contract.

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# In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 120

UNITED STATES OF AMERICA, PETITIONER

*v.*

GUARANTY TRUST COMPANY OF NEW YORK

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the District Court (R. 14) is not reported. The opinion of the Circuit Court of Appeals (R. 19–23) is reported in 69 F. (2d) 799.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1934 (R. 23). The petition for writ of certiorari was filed June 19, 1934, and was granted on October 8, 1934. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the laws of the foreign country or the laws of the American jurisdiction govern the rights and obligations of the drawer-drawee and of a subsequent American endorsee in the case of a check drawn and payable in this country to a foreign payee and transferred under a forged endorsement in the foreign country.

2. Whether the last endorsement made in New York on such check, "previous endorsements guaranteed", imports a guarantee of the genuineness of the prior endorsements as well as a guarantee of title.

## STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 18–19.

## STATEMENT

The case was presented in the District Court on stipulated facts (R. 5–27), which may be summarized as follows:

A check in the amount of $160, dated October 29, 1921, was drawn in Washington on the Treasurer of the United States, to the order of Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugo-Slavia, and mailed to the payee (R. 6). The check bears the purported endorsement of the payee made in Jugo-Slavia, and was transferred and delivered on or about November 30, 1921, to the Merkur Bank of Jugo-Slavia for a valuable

consideration (R 6). The purported endorsement of the payee is a forgery (R. 6). The Merkur Bank received the check in good faith and without being guilty of any negligence (R. 7), and thereafter duly endorsed the check and transferred and delivered it to the Slavenska Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration (R. 7). The Slavenska Bank received the check in good faith and without notice of the forgery (R. 7). On or about December 3, 1921, the Slavenska Bank endorsed and mailed the check to the respondent, which received it on or about December 21, 1921, in good faith, for value and without notice of the forgery (R. 8). The respondent, upon receipt of the check, stamped its endorsement on the back of the check and presented it to the Federal Reserve Bank of New York for collection. The respondent's endorsement contained the words "previous endorsements guaranteed." (R. 8.) The Federal Reserve Bank sent the check to the Treasurer of the United States for payment (R. 9). Upon receipt of the check the Treasurer of the United States paid it by crediting the Federal Reserve Bank of New York with the amount and the Federal Reserve Bank of New York in turn credited the amount to the respondent (R. 12). It was later discovered that the payee's endorsement was forged, and the petitioner thereupon requested reclamation, through the Federal Reserve Bank of New York, from the respondent (R. 12).

The law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange is as follows (R. 8):

> Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where
>
> (a) the instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and
>
> (b) the said transferee, holder or endorsee gives valuable consideration for the instrument; and
>
> (c) the said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument.

The law of Jugo-Slavia further provides that—

> (a) when an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and
>
> (b) the transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

Under the law of Jugo-Slavia an endorser does not guarantee or warrant the genuineness of prior endorsements.

The law, as above stated, was in 1921 and still is in full force and effect in Jugo-Slavia.

The District Court entered judgment in favor of the petitioner for the amount of the check and interest (R. 15). The Circuit Court of Appeals reversed (R. 23).

## SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the law of the place of foreign transfer governs the rights of an endorsee as against the drawer-drawee of an American check.

3. In holding that the respondent's title to the check, although acquired under a forged endorsement, authorized the respondent to demand and receive payment of the check in this country.

4. In holding that the respondent's endorsement, "previous endorsements guaranteed", was a guarantee of title merely, and not of the genuineness of prior endorsements.

## SUMMARY OF ARGUMENT

### I

The United States issued its check in the District of Columbia and payment was to be effected there. The laws of the District of Columbia, there-

fore, control the obligations of the contract. These laws provide that no obligation is incurred where the name of the payee of the instrument is forged, as occurred in the instant case. The respondent, in the absence of an endorsement by the payee of the check, may have acquired title thereto, but did not take as a holder in due course, nor did it acquire a negotiable instrument. It took title to the instrument subject to all defenses which the drawer of the check was entitled to advance, including both that of forgery of the payee's signature and that of failure of consideration. The money, having been mistakenly paid by the United States without any obligation on its part so to do, is recoverable.

## II

The respondent guaranteed all prior endorsements on the check. The Negotiable Instruments Law of New York, which controls the obligations of the endorsement, provides that an endorsement of this nature warrants, not only title, but also the genuineness of all prior endorsements. The fact that the respondent had title to the instrument did not relieve it from its warranty of the genuineness of prior endorsements. In addition thereto, the Treasury regulations governing the payment of checks require that all prior endorsements of a check be guaranteed by the receiving bank. The obvious purpose of this requirement is not only to make certain that the receiving bank has title to

the check, but also to make certain that the check has discharged the purpose for which it was drawn. The respondent, therefore, having warranted a prior endorsement which is now conceded to be a forgery, is liable to the United States for the amount received by it from the United States in payment of the check.

## ARGUMENT

### I

It is conceded that had the endorsement of the payee been forged in this country, subsequent holders would have acquired no title to the check, and the United States under the laws of the District of Columbia could have recovered upon the theory that the respondent had no right to receive payment on the check. The respondent, however, urged, and the court below found, that notwithstanding the forgery of the payee's signature, under the laws of Jugo-Slavia title to the check had passed to the transferor of the respondent; that the respondent had good title to the check, and had, therefore, the right to collect from the Treasury the amount set forth in the instrument. This ruling, we submit, rests upon a misconception both of the contractual obligations assumed by the United States in issuing the check, and the rights of the owner of the check.

In the case at bar, the United States issued a check by which it directed its Treasurer to pay a

certain sum of money to Louis Macakanja, or his order. The check was both drawn and payable in the District of Columbia. The *lex loci contractus* and the *lex loci solutionis* are identical, and the laws of the District of Columbia therefor govern the obligations of the contract. *Hutchinson* v. *Ward,* 192 N. Y. 375, 379; Cf. *Cox* v. *United States,* 6 Pet. 172, 203; *Scudder* v. *Union National Bank,* 91 U. S. 406, 412.

The issuance of the check constituted a contract whereby the United States agreed to pay a sum to the payee or his order, and had the United States refused so to do, undoubtedly the payee or his order could have enforced this contract against the United States. Admittedly, neither the payee nor his order received the money. However, under the laws of Jugo-Slavia, in which country the payee's signature was forged to the check, subsequent holders for value without notice of the forgery acquire good title, and it may be that the title acquired by the respondent is one which would be recognized by the courts of this country in an action where the question of title alone is involved. But although the law of the place of transfer may govern the validity of the transfer and the rights as between the transferees, it cannot enlarge the liability of the drawer-drawee under the laws of a jurisdiction where the check was both drawn and payable. Lorenzen, *The Conflict of Laws Relating to Bills and Notes,* 1919, p. 134; *Pritchard* v. *Nor-*

*ton,* 106 U. S. 124, 133; *Ory* v. *Winter,* 4 Martin N. S. (La.) 277.

The Code of Laws of the District of Columbia (Title 22, Section 24, *infra,* p. 18) provide that where a signature is forged it is wholly inoperative, and no right to enforce payment can be acquired under such signature. Where, therefore, the United States contracted to pay this sum of money in the District of Columbia, it must be held to have assumed only such obligations as were imposed by the laws of the District of Columbia. But under these laws a forged signature is inoperative and no right to enforce payment can be acquired under such signature. The United States, therefore, did not contract to pay this check, should the signature of the payee therein be forged. It therefore follows that, inasmuch as the signature of the payee was forged, no contractual liability existed on the part of the United States to pay to the holder of the check the sum called for therein. This sum was improperly paid to and received by the respondent. The respondent may have had title to the check, but it did not possess any enforceable right against the United States.

There is no contradiction in the conception that an individual may have legal title to an instrument purporting to be negotiable, but still have no enforceable rights against the maker thereof. It finds its analogy in cases where the holder of a negotiable instrument has title to a paper but no

enforceable rights against the maker or drawer thereof. In certain cases an intervening discharge in bankruptcy deprives the holder of a negotiable instrument of an enforceable right against the drawer of the instrument. *Blackwell* v. *Farmers & Merchants National Bank,* 97 Texas, 445. See Section 63 of the National Bankruptcy Act. In certain cases where the death of the drawer of a check occurs before payment, the payee has title to the check but no enforceable right. *Weiand's Administrator* v. *State National Bank of Maysville,* 112 Ky. 310; *Pullen* v. *Placer County Bank,* 138 Cal. 169; Daniel on *Negotiable Instruments,* 4th Ed., Sec. 1618(b). Likewise, the owner of a negotiable instrument, acquiring title thereto after maturity, takes such instrument subject to any defense which the maker or drawer may have, and may in certain circumstances have no enforceable rights while possessing title. *Beneficial Loan Association* v. *Hillery,* 95 N. J. L. 271; *State ex rel. Hadley* v. *Greenville Bank,* 187 S. W. (Mo.) 597. It is submitted that the respondent stands in no better position than the holders of negotiable paper in the instances herein set forth.

There exists likewise another and compelling reason whereby the United States should succeed in the instant case. Obviously, the forgery of the payee's name constituted no endorsement, and the check did not constitute a negotiable instrument until such endorsement was made. Title 22, Section 60, of the Code of Laws of the District of Columbia, *infra,* p.

18. Although the title to the instrument itself thereafter passed in Jugo-Slavia to holders without notice and for valuable consideration, they did not acquire a negotiable instrument, nor were they or the respondent holders in due course. When the check was presented it was subject to any defenses which might be urged or advanced by the drawer thereof. Section 49 of the Negotiable Instruments Act. *Mayers* v. *McRimmon,* 140 N. C. 640; *Meuer* v. *Phoenix National Bank,* 94 App. Div. 331, 334, affirmed, 183 N. Y. 511. See *Goshen National Bank* v. *Bingham,* 118 N. Y. 349. The respondent, therefore, did not in fact possess a negotiable instrument, but only had title to the paper, subject to any defense which the drawer of the instrument might assert. Obviously, had the facts been known to it, the United States would have been entitled to refuse to pay on the grounds that the check had been issued in payment of an obligation, that that obligation had not been satisfied, and that therefore there was failure of consideration, and likewise the forgery of the payee's signature would have constituted a complete and adequate defense to any such claim advanced by the respondent.

In support of its opinion, the court below cited as precedents *Embiricos* v. *Anglo-Austrian Bank,* 1 K. B. (1905) 677, and *Weissman et al.* v. *Banque de Bruxelles,* 254 N. Y. 488. We submit that the proper interpretation of these cases discloses that they are not analogous to the case at bar.

In the *Embiricos* case, the action was one for damages for conversion brought against the endorser by the payee who had already endorsed the bill. The action therefore was on the auxiliary contract endorsement, and not on the original contract of the drawer. See *Everett* v. *Vendryes,* 19 N. Y. 436; *Robertson* v. *Burdekin,* 6 Dunlop 17. There is also present the distinction that the bill in the *Embiricos* case was a foreign bill of exchange, while in the instant case the check is an inland bill of exchange. See opinion of Romer, L. J., in the *Embiricos* case. The same distinction obtains in the *Weissman* case.

We submit, therefore, that the court below was in error in holding that the obligation of the contract was not governed by the laws of the District of Columbia, that the check in question constituted a negotiable instrument when it was acquired by the respondent, or that respondent was entitled to receive payment on the instrument from the United States.

## II

Aside from the fact that the United States is entitled to recover from the respondent for the reasons set forth in Point I of this brief, it possesses an additional ground for recovery by reason of the fact that the respondent stamped upon the check "previous endorsements guaranteed."

The obligation of the respondent under its contract of endorsement is governed by the law of the

place where the contract of endorsement was made, that is, of New York. *Spies* v. *National City Bank,* 174 N. Y. 222, 225. Sections 115 and 116 of the Negotiable Instruments Law of New York (*infra,* p. 19) provide that every endorser who endorses without qualification warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has good legal title to it; and (3) that all prior parties had capacity to contract. If the sole warranty were one of title there would be no reason for warranties (1) and (3). If an instrument "is genuine and in all respects what it purports to be", the prior endorsements must all be genuine. Where one of the endorsements is forged, the instrument is no longer genuine, for the signatures of all prior parties are inherent factors in the instrument. The holding of the court below amounts to a ruling that all subsections of Section 115 of the Negotiable Instruments Law of New York, except Subsection 2, are mere verbiage. Obviously they are not intended to be such, and the only way in which all the subsections of Section 115 can be given legal significance is to hold that the endorser warrants that all prior signatures, including endorsements, are genuine.

The courts of New York have held, under this section, that an endorser guarantees the genuineness of the signature of prior endorsers. *Packard* v. *Windholz,* 88 App. Div. 365, 366, affirmed, 180 N. Y. 549; *Oriental Bank* v. *Gallo,* 112 App. Div.

360, 362, affirmed, 188 N. Y. 610; *Geering* v. *Metropolitan Bank,* 170 App. Div. 751, 753, affirmed, 225 N. Y. 711. This Court has followed the same rule without the aid of the statute, *United States* v. *National Exchange Bank,* 214 U. S. 302, 319, as the Court of Appeals of New York did before the statute was passed, *Turnbull* v. *Bowyer,* 40 N. Y. 456, 460. If there were any doubt about the effect, in that respect, of a simple general endorsement, it would seem to be removed by the special stamping "prior endorsements guaranteed."

The Treasury Department circular in force at the time (R. 9–11) required that checks on the Treasurer of the United States, presented to Federal Reserve Banks for payment, must be "properly indorsed by responsible incorporated banks and trust companies who guarantee all prior endorsements thereon." The respondent had knowledge of this circular when it dealt with the check in question (R. 12) and the form of its endorsement (if differing at all from that commonly in use by it) was evidently directed to the requirements of the circular. The words "prior endorsements guaranteed" can only mean one thing. They are not a warranty of title, which is warranted by the mere fact of transfer, but are a guarantee of "prior endorsements"; that is, of their genuineness. A bank endorsing in this form warrants the authenticity of the penmanship of prior endorsements, quite as much as its own title. Authenticity of the

penmanship is, of course, used in the sense that in addition to the endorsement of the payee, there is also comprehended the endorsement of someone whom the law considers to have authority to sign for him.

Independently of the obligations of the respondent under the Negotiable Instruments Law of New York under its guarantee of all prior endorsements, the respondent by presenting its check to the Federal Reserve Bank of New York in accordance with the Treasury regulation discussed, *supra,* thereby contracted with the United States that as a consideration for the cashing of the check it guaranteed all prior endorsements and not merely that it had title to the check. In honoring the check, therefore, the United States was relying not merely upon the obligations imposed upon the respondent by the Negotiable Instruments Law of New York, but also and more specifically upon the exact type of endorsement which it required as a condition precedent to the payment of the check. The regulations specifically provide that all prior endorsements must be guaranteed by the collecting bank and not merely that the bank have title to the instrument.

The reasonableness of such a requirement is evidenced by the situation here presented. The Government yearly mails great numbers of checks to payees both in this country and abroad. In many instances the checks are given for the purpose of

discharging existing obligations of the United States, which obligations, if not discharged, could be enforced against it. If, therefore, title be acquired to a check in a manner such as herein appears, and the Government pays that check without extinguishing the obligation for the discharge of which it was issued, serious and heavy losses might be sustained by the United States. When, in order to preclude the possibility of such losses, it requires that all prior endorsements be guaranteed, it is not merely concerned with the title to the instrument; it is seeking to protect itself against double liability, as it has not only the right but the duty to do.

The payee's endorsement having been forged and the check having been paid under a mistake as to the genuineness of the signature of the payee, the amount of the check is recoverable by the United States from the respondent. *United States* v. *National Exchange Bank*, 214 U. S. 302; *United States* v. *Chase National Bank*, 252 U. S. 485, 493; *First National Bank* v. *Whitman*, 94 U. S. 343.

It is submitted that the decision of the court below, insofar as it failed not only to give effect to all the provisions of the Negotiable Instruments Law of New York, with respect to the guarantee of prior endorsements, but particularly its failure to recognize that the United States required a guarantee of all prior endorsements as a condition precedent to payment of its checks, was incorrect.

## CONCLUSION

We submit that the decision of the court below is incorrect and should be reversed.

Respectfully submitted.

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OCTOBER 1934.

# APPENDIX

## STATUTES

Title 22, Sections 24, 60, and 91, of the Code of Laws of the District of Columbia provides as follows:

### SECTION 24

Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

### SECTION 60

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

> The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. * * *

Section 116 of the Negotiable Instruments Law of New York provides as follows:

> Every endorser who indorses without qualification, warrants to all subsequent holders in due course:
>
> (1) The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and,
>
> (2) That the instrument is at the time of his endorsement valid and subsisting.

The "matters and things mentioned in subdivisions one, two, and three" of Section 115 are as follows:

> (1) That the instrument is genuine and in all respects what it purports to be;
>
> (2) That he has a good title to it;
>
> (3) That all prior parties had capacity to contract.

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| Hudson and Feller, 44 Harvard Law Rev. 333 | 18 |
| International Conference on Bills of Exchange (1910), Senate Doc., Vol. 57, 61st Cong., 3d Sess., 1910–1911, p. 27 | 15 |
| Lorenzen, The Conflict of Laws Relating to Bills and Notes, pp. 139–140 | 14 |

# In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 120

UNITED STATES OF AMERICA, PETITIONER

*v.*

GUARANTY TRUST COMPANY OF NEW YORK

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

### I

This case, we submit, is governed by the principle announced in the case of *Closter Nat. Bank* v. *Federal Reserve Bank of New York,* 285 Fed. 138 (C. C. A. 2d), certiorari denied, 261 U. S. 613. There the court had before it almost the exact question now involved, namely, the effect of a Treasury regulation making the handling of Government checks "subject to final payment by the Treasurer of the United States" and providing that the Federal Reserve Bank of New York "as a condition of receiving government warrants and checks on the Treasurer of the United States from member banks for credit, reserves the right to charge back and

return to the depositor at any time and unconditionally any such item deposited with the Federal Reserve Bank of New York." The court said (p. 140):

> The contract between the parties embraces the contents and obligations imposed by the circular letter No. 37. The defendant in error was appointed depository and fiscal agent of the United States, and it offered to certain member banks of the Second Federal Reserve District the option of presenting for payment checks and warrants on the Treasurer of the United States through it, but it made the terms as set forth in the circular above. The plaintiff in error was free to accept or refuse to accept the services of the defendant in error as it saw fit. It might have used other available means for collecting government checks and warrants, if it so desired. While immediately crediting the account of the plaintiff in error with the defendant in error, it was always subjected to final payment by the Treasurer. Crediting the account accorded an advantage to the member banks in affording means for making funds promptly available. In undertaking this service, the defendant in error became a collecting agent. Under the terms of the circular, defendant in error had the right, should the United States at any time not pay, to return such check for any reason which the government might consider good, and the defendant in error could at any time and unconditionally charge back the

amount credited to the plaintiff in error, at the same time returning the item so charged back. The right to do so was indefinite as to time; it might be done at any time and unconditionally. It was with this understanding and agreement that the defendant in error gave credit and accepted the obligation to perform this service for the plaintiff in error.

But it is contended that the defendant in error's right to charge back the item is dependent upon its showing that the item was in fact a forgery and alteration as claimed by the Treasurer. By the terms of the collection agreement under which the defendant in error performed the service, the collection agent had the right, if it acted in good faith, to charge back the item to the plaintiff in error's account, without the necessity of establishing a forgery or alteration of the warrant. The memorandum credit accorded, by the agreement of which the circular letter is a part, was always qualified by the clause "subject to final payment." And by that clause the government has for many years exercised the right of returning at any time warrants and checks, which for any cause have not been considered good, and the plaintiff in error was notified that this practice would be continued as a condition of receiving government warrants and checks on the Treasurer of the United States from member banks for credit, with "the right to charge back at any time and return to the depositor at any time

> and unconditionally any such item deposited with the Federal Reserve Bank." To place any other construction upon the terms of the circular would be to treat the phrase quoted as surplusage.

In the pending case the record shows (R. 8–9) that a regulation identical in form—so far as the material elements are concerned—was in effect at the time of the transaction involved; the respondent, Guaranty Trust Company, was fully informed thereof; and "agreed to the terms and conditions herein set forth * * *." (R. 9.)

The attention of the Circuit Court of Appeals was apparently not called to the *Closter National Bank* case, for it is not mentioned by name in the opinion, nor is recognition given to the principle established therein. Moreover, when consideration is given to the decision in the *Closter National Bank* case, the unsoundness of the position taken by respondent in its brief at once becomes apparent. Whatever the usual rule may be regarding guaranteed indorsements, the United States Government, by reason of the Treasury regulation, occupied a preferred position. It was not necessary for the respondent to accept this check or any other Government check, or to present the same to the Federal Reserve Bank, but having done so, with full knowledge of the regulation, it recognized and consented to this preferred position, as a condition of transacting this business, and cannot thereafter be heard to complain.

## II

In view of the fact that this case comes clearly within the scope of the *Closter National Bank* case, it is unnecessary for the Court to decide at this time the question of conflict of laws which is argued in the briefs and which formed, in part, the basis for the decision in the Circuit Court of Appeals. In view of the difficulty of the question, it may be wise to avoid a decision of that question at this time. If that decision must be made at this time, however, then it is submitted that the proper rule should be that, at least as to inland bills of exchange, the law of the place of making and performance should govern and the law of the place of transfer should be disregarded.

It is conceded by the respondent that "under American law the forged endorsement of the payee of a negotiable instrument is wholly inoperative, and that no right to retain the instrument or enforce payment thereof can be acquired through the forged signature." (Br. p. 7.) It is conceded by the Government that under the law of Jugo-Slavia the reverse may be true. It is further conceded by the respondent that "If the American law is to apply here, then the petitioner is entitled to a reversal of the judgment below, * * *." (Br. p. 8.)

Respondent has cited several authorities in support of its contention that a rule of conflict of laws should be set up which will recognize the law of

Jugo-Slavia regarding forged indorsements. It is interesting to note that each one of these rely in turn upon the English case of *Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. [1905], 1 K. B. 677. The *Embiricos* case does not support the contention and, as a matter of fact, is authority for the position taken by the Government. That case is based upon Section 72 of the English Bills of Exchange Act. That Act, unlike the American Negotiable Instruments Law, contains several rules for determining conflicts of law. Section 72 is one of these, and, so far as it refers to the present case, reads as follows:

> 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:
>
> * * * * *
>
> (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.
>
> *Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom.* [Italics ours.]

An examination of the facts of the *Embiricos* case shows at once that they did not come within the terms of the proviso of subdivision (2) of Section 72, but related to a foreign bill of exchange, a

cheque drawn by a Roumanian bank in Roumania. Romer L. J. makes it very clear that the case does not fall within the proviso just referred to when he says at page 686:

> The proviso to that subsection—"That where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom"—does not touch the present case.

However persuasive the decision may be, therefore, as applied to the rule of conflict generally, the fact cannot be escaped that for some reason England was unwilling to adopt such a rule for application to cases of inland bills. Oddly enough, each one of the authorities upon which respondent relies, and which in turn rely upon the *Embiricos* case, fail to notice the distinction, clearly made in the Bills of Exchange Act and clearly noted by Romer L. J. in that case. As the check involved in the present case is an inland bill,[1] the *Embiricos* case not only fails

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[1] Negotiable Instruments Law: "Sec. 129. Inland and Foreign Bills of Exchange: An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill."

Bills of Exchange Act: "Sec. 4. (1) An inland bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

"For the purposes of this Act 'British Islands' means any part of the United Kingdom of Great Britain and Ire-

to support respondent's contention but becomes authority for the Government's contention. If a rule of conflict of laws is to be enunciated at this time upon the basis of that case, it must necessarily contain a proviso to the effect that the law of the place of drawing and paying shall govern in determining the validity and effectiveness of a forged indorsement of an inland bill of exchange.

It is to be noted also that the other cases cited by respondent involve conflicts between the laws of countries which are embraced within what is called the Anglo-American system as distinguished from the Continental system of law. Even though a rule of conflict speaks generally when applied to such a situation, certainly a new element arises when it is proposed to make it applicable to other systems of law, inconsistent with and out of harmony with the underlying, fundamental concepts of Anglo-American jurisprudence. Would the proponents of this rule insist that it be made applicable to Japanese, Chinese, and other systems of law as well as the Continental? Where shall the line be drawn? It is said that the Government in this case sent the check to the payee in Jugo-Slavia and

---

land, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

"(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill."

That a check is a bill of exchange in Anglo-American law, see B. E. A. Sec. 73 and N. I. L. Sec. 185.

must therefore have contemplated its negotiation there. But the rule proposed to govern this case, would include a case in which a check was intended only for negotiation and payment in the District of Columbia but which was stolen and carried away to another country.

Even as to rules of law in operation in other Anglo-American countries, the courts of the United States have refused to give effect, where they were out of harmony with our ideas of justice and public policy. *Compania La. Flecha* v. *Brauer,* 168 U. S. 104; *The China,* 74 U. S. (7 Wall.) 53. This is equally or perhaps more true in the case of laws of countries outside of the Anglo-American system. Thus in *Oscanyan* v. *Arms Co.,* 103 U. S. 261, at page 277, this Court said:

> But admitting this to be otherwise, and that the Turkish government was willing that its officers should be allowed to take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. *Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement.*

> The general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; but to this, as to all general rules, there are exceptions, and among these Story mentions *contracts made in a foreign country to promote or reward the commission of crime, to corrupt or evade the due administration of justice, to cheat public agents, or to affect the public rights, and other contracts which in their nature are founded in moral turpitude, and are inconsistent with the good order and solid interest of society.* "All such contracts," he adds, "even although they might be held valid in a country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of international jurisprudence." Story, Conflict of Laws, sect. 258. [Italics ours.]

It must be observed that throughout the length and breadth of the Anglo-American countries the rule is that a forged indorsement of a bill of exchange is invalid. A rule of conflict which is intended to operate within those countries would, then, have the effect of recognizing the ideas of morality, public policy and justice expressed by this uniform legislation and the common law upon which it is founded. When that rule is extended to include in its operation the laws of other countries,

the result may be, as is plainly evident here, the adoption into our system of law of legal concepts entirely inconsistent therewith. What greater inducement could be given "to promote or reward the commission of crime, to corrupt or evade the due administration of justice" than to put a premium on forgery as would be done by the adoption of this rule? It avails nothing to reply that we are considering a rule of choice as to which of two conflicting laws shall be used. The effect of the adoption of the rule contended for by the respondent would be to incorporate the provision of the Continental system of law into our law whenever the rule of conflict were applied. The American Law Institute Restatement, upon which the respondent relies for support of its contention, recognizes the difference between the fundamental legal concepts of the common law and those of the legal systems of other countries (pp. 32–34):

> § 4. COMMON LAW DEFINED.
>
> *The common law is the general Anglo-American system of legal concepts and the traditional legal technique which forms the basis of the law of the states which have adopted it.*
>
> *Comment:*
>
> *a.* The common law, as defined in this Section, is intended to characterize that system of legal thought and the legal technique which the courts in Anglo-American states employ in the determination of legal controversies. It is to be distinguished from "the

law of a particular state", whether statute law or common law as defined in § 3. It sometimes happens, therefore, that the law of one particular state will differ from that of another state although both states employ the same system of legal concepts and the same traditional technique as the basis of their law. *When it is necessary to the determination of a legal controversy to determine whether the law of one or another of two or more states is applicable to a legal situation, such determination is made according to the principles of Conflict of Laws which is itself a part of the general system of the common law as defined in this Section* (*see* § 5). [Italics ours.]

*b.* The definition of the common law as stated in this Section is not intended to convey all the characteristics of such law, but only such as may be important in the Restatement of this Subject. Other qualities of the common law are of importance such as the technique or application of law and the presuppositions as to justice and economic need which, being in the minds of lawyers, color their application of the common law system from age to age. It is, in fact, the latter element which in most cases leads to changes in the common law. *For the purposes of the Restatement of this Subject, however, the distinction between the law of a particular state and the general system of common law is the particular point of interest.* [Italics ours.]

* * * * *

§ 5. LEGAL NATURE OF CONFLICT OF LAWS.

*The rules of Conflict of Laws are part of the law of each common law state, and as such are as binding upon the courts as any other parts of the law of the state.*

*Comment:*

*a.* That part of the law of a state called Conflict of Laws is not forced on a state by any external power. *The state has the same freedom to adopt its own rules of Conflict of Laws that it has to adopt any rules of law.* Conflict of Laws as adopted becomes no less definitely a part of the law than any other branch of the state's law; and in the application of its principles the courts have no more discretion than in any other part of the law. A mandatory limitation is placed in some instances upon the States of the United States where the Constitution limits the freedom of the States to adopt such rules of Conflict of Laws as they might otherwise see fit to adopt. [Italics ours.]

*b. Each court applies the law of its own state, as it understands it; including its own conception of Conflict of Laws. It derives this law from the same sources used for determining all its law; from precedent, from analogy, from legal reason, and from consideration of ethical and social need.* In restating this branch of the law the same problems of generally accepted doctrine, of local peculiarity, and of statutory modification are presented as in restating any other subject of the law. [Italics ours.]

Respondent quotes from Lorenzen, *The Conflict of Laws Relating to Bills and Notes,* pages 139–140, in which that authority states the question: *"Is not such a passing of title opposed so clearly to our fundamental notions of justice that giving effect thereto would be in contravention of our policy?"* He then answers the question—relying upon the *Embiricos* case, which, as has been shown, is not in point—by saying: "Whether one rule or the other should be chosen is merely a question of commercial policy. As no moral issues are involved the recognition of such foreign acquired title would not shock the conscience of our courts." It is submitted on behalf of the Government that this is not the correct answer. Much more than a question of commercial policy is involved and long and careful consideration should be given before it is permitted, thus by indirect means, to bring into our law a concept so antagonistic to our uniformly expressed views upon the subject.

Apparently English legislators were willing to make the concession which appears in the rule as set out in the Bills of Exchange Act, recognizing the validity of a forged endorsement of a foreign bill of exchange. Presumably this was done because commercial practice must contemplate the common and frequent interchange of such instruments, and the necessity for some recognition of foreign laws in connection therewith. The danger,

such as suggested in the *Oscanyan* case of promoting or rewarding the commission of crime or corrupting or evading the due administration of justice may perhaps be less in case of the forgery of a foreign bill. Certainly there would not be the same inducement to commit crime as would be involved in inviting thieves to carry inland bills into another country, there to forge indorsements and put them back into circulation, with knowledge that the commercial world would be complacent in its attitude toward such a practice, and the administration of justice in such cases transferred to a foreign forum.

The desirability of delay in establishing a rule of conflict of law upon this point is also shown by the fact that commercial practice regarding the use of checks is not the same in the various countries. This is illustrated by the development by English bankers of what is known as the "crossed check." As was said in the Report of the American Delegate to the International Conference on Bills of Exchange (1910), Senate Documents, Vol. 57, 61st Cong., 3d Sess., 1910–1911, p. 27:

> A crossed check is a check with two parallel lines on the face, between which are usually written the name of a bank or banking house. *A crossed check is payable only through a banker.* Hence it is difficult, if not impossible, for an illegitimate holder to obtain cash for it by presentment at a bank counter. He must deposit the check in an

account at a bank in order that it may be honored when presented by such bank to the institution upon which it is drawn.

The result of this system of crossed checks is to afford a means of transfer of money much safer than the ordinary check, upon which cash can be drawn directly, and affords no inconveniences to persons having a bank account and depositing checks of which they are legitimate holders in such an account for collection.

The system of crossed checks has been as yet employed but little in the United States. *It is not necessary in the matter of inland transactions, for the purposes for which it is employed in England, because the American drawer and payee of a check are protected by the rule making the bank responsible for wrongful payment.* In drawing checks upon foreign institutions, however, the system of crossed checks has been employed to a limited extent by American bankers. Its advantages are such that it has gradually obtained a footing on the Continent of Europe, even in the absence of definite legislation giving it legal recognition. [Italics ours.]

The differences between Anglo-American and Continental rules regarding checks and other bills of exchange are so great that they cannot be worked out by judicial action in setting up rules of conflict of laws. Even in the efforts which have been made at the Geneva Conferences to unify the rules of pri-

vate international law in relation to bills of exchange, the Anglo-American nations have held aloof,[2] and it has been recognized by writers upon the subject that the fundamental differences between the laws of the Anglo-American nations and those of the Continental countries are so great that

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[2] Gutteridge, 16 Jour. of Comp. Legis. (3d series), pp. 53–54: "It is, no doubt, true that the movement for the unification of the national laws of commercial paper has made considerable progress as the result of the International Conferences held at Geneva in 1930 and 1931. It would be premature to speak with confidence, but there are grounds for the hope that the Uniform Law of 1930 on bills and notes, and the Uniform Law of 1931 on cheques, will ultimately be adopted by the great majority of the twenty-six countries which signed the conventions at Geneva. Such uniformity as may follow will, however, still be regional, because the United States and the British Commonwealth of Nations together with certain of the Latin American Republics have been unable to participate in the movement. It is therefore hardly an exaggeration to say that the majority of the negotiable instruments which now circulate in international commerce will, as heretofore, contain within them the germs of future conflicts of laws. The delegates at Geneva were keenly alive to this aspect of the situation, and an attempt was made to meet it by the drafting of two separate conventions which were intended to unify the rules of private international law in relation to bills and notes (Convention of 1930), and in relation to cheques (Convention of 1931). These were signed by all the nations which adhered to the two conventions on the substantive or material law, and the hope was expressed that the Anglo-American countries might see their way to follow suit, even though they felt compelled to stand aloof from the general scheme of unification.

even the possibility of securing uniform legislation is doubtful.[3]

Respectfully submitted.

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NOVEMBER 1934.

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[3] Gutteridge, *supra*, pp. 54, 57–59, and see Hudson and Feller, 44 Harvard Law Rev. 333.

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IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 120.

UNITED STATES OF AMERICA,
*Petitioner,*

v.

GUARANTY TRUST COMPANY OF NEW YORK,
*Respondent.*

## BRIEF ON BEHALF OF RESPONDENT GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

THE BALLOU PRESS NEW YORK

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## BRIEF ON BEHALF OF RESPONDENT GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Statement.

The United States of America has petitioned for a writ of certiorari to review the judgment (R. 46-47) of the United States Circuit Court of Appeals for the Second Circuit entered in this action on March 19, 1934, which reversed the judgment (R. 32-33) of the District Court of the United States for the Southern District of New York.

* * * * * * *

The facts, which were stipulated by the parties (R. 12-28), are briefly as follows:

On or about October 29, 1921, a check was drawn on the Treasurer of the United States in the sum of $160, to the order of Louis Macakanja, and then the check was forwarded by mail to the payee at Maja, Jugo-Slavia. The name of the payee appears in writing on the back of the check on the line where the payee is required to sign. It has been stipulated that the endorsement of the payee is a forgery. The purported endorsement of the payee was made in Jugo-Slavia on or about November 30, 1921, and on that date the check was transferred and delivered to the "Merkur" Bank in Jugo-Slavia for a valuable consideration. Subsequently and about December 3, 1921, the "Merkur" Bank duly endorsed the said check and transferred and delivered it to the "Slavenska" Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration. Both banks received the check in good faith and took it without actual notice of any forgery or other defect, and were not guilty of any fraud or negligence in the matter.

On or about December 3, 1921, the "Slavenska" Bank, for value received, duly endorsed the check in Jugo-Slavia to the order of the Guaranty Trust Company of New York, the respondent in this action, and on the same day forwarded the check to the respondent by mail. The respondent received the check by mail from the "Slavenska" Bank on or about December 21, 1921, in good faith, and took it without actual notice of the forgery of the payee's endorsement or of any other defect, and was not guilty of any fraud or negligence in taking the same. The respondent was a purchaser of the check for value, and not a collecting bank. The respondent, after receiving the check, endorsed the same in New York and presented it to the Federal Reserve Bank of New York, as Fiscal Agent of the United States of America, for payment. The Treasurer of the United States, upon receipt of the check from the Federal Reserve Bank of New York, paid the same by crediting the Federal Reserve Bank of New York with the amount of the check, and that Bank in turn credited the respondent with the amount of the check some time in Decem-

ber, 1921. On April 27, 1926, the petitioner ascertained that the payee's endorsement on the check was forged, and on June 1, 1926, requested reclamation through the Federal Reserve Bank of New York from the respondent, which was refused.

The District Court gave judgment in favor of the Petitioner in the amount of $259.32 (R. 32-33).

The Circuit Court of Appeals reversed the judgment of the District Court (R. 46-47). The opinion of the Circuit Court of Appeals (R. 43-46) is reported in 69 Fed. (2d) 799.

## Question Presented.

It is conceded that if the forged endorsement had been made in this country subsequent holders of the check, including the respondent, would have acquired no title and the petitioner could have recovered upon the theory that the respondent had no right to receive payment and so had been unjustly enriched. It is also conceded that under the law of Jugo-Slavia,* where the check was negotiated, the Jugo-Slavian banks acquired good title in spite of the forged endorsement. The question, therefore, is merely one of conflicts of laws involving a negotiable instrument: Whether or not the law of Jugo-Slavia controls in so far as the liability of the respondent is concerned.

It is not a question, as petitioner urges, of great public importance calling for the review and determination by this Court. The fact that the United States is a party to the action gives no color of importance to a question which primarily involves mercantile laws. Nor is the proper solution of the question in doubt. The decision of the Circuit Court of Appeals for the Second Circuit is in accord with the English rule of almost thirty years' standing, and with the rule prevailing in the State of New York.

---

* The law of Jugo-Slavia with reference to checks and bills of exchange in 1921 is set forth correctly at pages 4 and 5 of the petition herein.

# ARGUMENT.

## I.

## The Law of Jugo-Slavia Controls.

### A.

THE LAW OF THE PLACE OF TRANSFER OF A NEGOTIABLE INSTRUMENT DETERMINES THE RIGHTS ACQUIRED BY THE TRANSFEREE.

Although the authorities on this subject are not legion, we submit that it is well settled that in determining whether a holder has acquired a valid or a good title to a negotiable instrument, the law of the place where the instrument was transferred should govern.

In England where the law with reference to forged endorsements is the same as in this country it has been squarely held in an analogous case that in determining a party's title to a check the law of the place where the check was transferred should govern and control. This case is *Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. [1905] 1 K. B. 677.

The conflicts of law rule thus adopted by the English Court of Appeal was definitely approved by the Court of Appeals of the State of New York in the case of *Weissman, et al.* v. *Banque de Bruxelles,* 254 N. Y. 488, at page 494, and again in *Hutchison* v. *Ross,* 262 N. Y. 381, at 389, 390.

See also

*McClintick* v. *Cummins,* Fed. Cas. No. 8699;
*Dundas, et al.* v. *Bowler, et al.,* Fed. Cas. No. 4141;
*Guernsey* v. *Imperial Bank of Canada,* 188 Fed. 300.

The American Law Institute and leading writers on the subject adhere to the same view:

Goodrich—*Conflict of Laws,* pp. 361, 363 and 364;
*Tentative Restatement of Conflict of Laws* by American Law Institute, Draft No. 34, dated Oct. 16, 1930, Section 282, particularly the comment "d" thereunder;
Lorenzen—*The Conflict of Laws Relating to Bills and Notes,* pp. 139 and 140;
Minor—*Conflict of Laws,* pp. 392 and 393.

This Court has applied the same rule to intangible personal property, such as stock certificates in *Disconto—Gesellschaft* v. *U. S. Steel Co.,* 267 U. S. 22, at 28-29.

B.

THE TRANSFER OF THE CHECK IN QUESTION TOOK PLACE IN JUGO-SLAVIA.

The petitioner has stipulated that the transfers to the "Merkur" and "Slavenska" banks occurred in Jugo-Slavia. The transfer to the respondent was also made there. It is stipulated that the check was endorsed by the "Slavenska" Bank to the order of respondent for value, in Jugo-Slavia, and then mailed to respondent in New York. The placing of the check in the mails constituted, in legal effect, a delivery to respondent in Jugo-Slavia, and hence a transfer to respondent there.

See

*Hayden* v. *Chemical National Bank,* 84 Fed. 874; affirmed in 174 U. S. 610;
*Chapman* v. *Mills and Gibb,* 241 Fed. 715; affirmed 250 Fed. 1018.

Regardless of whether the transfer to the respondent be considered to have occurred in Jugo-Slavia or some other place the respondent acquired the same title which its transferor, the "Slavenska" Bank had at the time of transfer

(Title 22, Sec. 78 Code of Laws—District of Columbia, *infra*, p. 9). (Sec. 97 of New York Negotiable Instruments Law, *infra*, p. 9.) Therefore, in determining whether the respondent had good title to the check when it presented the same for payment, the law of Jugo-Slavia applies. Under the law of that country the respondent and the foreign banks obtained good title to the instrument and the right to collect and retain the proceeds thereof, since each gave value and took the instrument without notice of the forgery, fraud or negligence.

It should be noted that the petitioner sent the check by mail to the payee in Jugo-Slavia. In so doing petitioner must have anticipated that the check would necessarily be negotiated there in order for the payee to collect the proceeds, and thereby consented that the law of Jugo-Slavia with reference to the passage of title upon a forged endorsement should control.

## II.

### The warranty contained in the respondent's endorsement does not affect or defeat its right to retain the proceeds.

The Circuit Court of Appeals, we submit, was correct in holding that there was no breach of warranty in this case. There is no warranty or guaranty of prior endorsements except as relates to title, i. e., an endorsement merely guarantees that the prior endorsements are efficacious to transfer title. The courts invariably couple a warranty or guaranty of prior endorsements to the question of the passing of title.

*Leather Manufacturer's Bank* v. *Merchants Bank*, 128 U. S. 26 at pp. 34-35;

*United States* v. *National Exchange Bank*, 214 U. S. 302, at 316;

*American Exchange National Bank* v. *Yorkville Bank,* 122 Misc. 616, at 621, aff'd 210 App. Div. 885;

*Insurance Co. of North America* v. *Fourth National Bank,* 12 Fed. (2d) 100 at 101.

Naturally under the American law the question of a warranty of prior endorsements can hardly be separated from the question of title since under that law, if the payee's signature is forged, the instrument becomes wholly inoperative, and title does not pass (Title 22, Sec. 24, Code of Laws—District of Columbia, *infra,* p. 9). (Sec. 42—New York Negotiable Instruments Law, *infra,* p. 9). The warranty of an endorsement does not warrant the "authentic penmanship" of the payee but merely that the endorsement of the payee by whomever written was sufficient to pass title to the instrument. If the signature is written by an authorized agent of the payee, the penmanship is not that of the payee but of the agent, and yet the warranty of endorsement is not breached since title passes by reason of the agent's having been authorized to sign the payee's name. The same thing is true where the signature of the payee was originally unauthorized, but subsequently ratified. By reason of the substantive law in Jugo-Slavia, where the transfers of the check involved here occurred, the same result follows as in the case of an endorsement by an authorized agent in the United States. A warranty of signature, separate and apart from a warranty of title, would have no meaning and no consequences.

The fact that the Treasury Regulations required a guaranty of prior endorsements does not alter the situation since an express guaranty of prior endorsements cannot be more than a warranty that the prior endorsements are legally sufficient to pass title. The Government is bound by the same rules which affect ordinary individuals so far as commercial paper is concerned. *United States* v. *National Exchange* Bank, 270 U. S. 527, 534.

## III.

**Consideration of the fact that the instrument was drawn and payable in the District of Columbia.**

If a transfer is complete and effective according to the law of the place where it takes place, so that the transferee gets good title to the instrument, and the legal owner thereof subsequently presents it for payment to the drawer-drawee, the obligation of the latter is governed by the law of the place where the instrument is payable, and that obligation is simply to pay the instrument according to its tenor (Title 22—Sec. 91—Code of Laws—District of Columbia, *infra,* p. 9) (Sec. 111—New York Negotiable Instruments Law, *infra,* p. 9). This obligation the petitioner cannot escape despite the subsequent discovery of the fact that the payee's signature was forged.

Counsel for the petitioner largely bases his argument on the conception that title to the instrument may be separated from the right to receive the amount due thereon. He concedes that a good title to the instrument passed to the "Merkur" Bank, but nevertheless argues that the successor in title cannot collect and retain the money. We submit this is a misconception of the whole theory of negotiability. The essence of a negotiable instrument is that the right to the money due thereon is inseparable from the ownership of the instrument.

## CONCLUSION.

**The petition for a writ of certiorari should be denied.**

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

July 25, 1934.

# APPENDIX.

## Statutes.

Title 22, Sections 24, 78 and 91 of the Code of Laws of the District of Columbia provides as follows:

> § 24. Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.
>
> § 78. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.
>
> § 91. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Section 42 of the New York Negotiable Instruments Law is identical to Section 24 of the Code of Laws of the District of Columbia, set forth above.

Section 97 of the New York Negotiable Instruments Law is identical to Section 78 of the Code of Laws of the District of Columbia, set forth above.

Section 111 of the New York Negotiable Instruments Law is identical to Section 91 of the Code of Laws of the District of Columbia, set forth above.

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NOV 3 1934

CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 120.

UNITED STATES OF AMERICA,
*Petitioner,*

*against*

GUARANTY TRUST COMPANY OF NEW YORK,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF ON BEHALF OF RESPONDENT GUARANTY TRUST COMPANY OF NEW YORK.

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

THE BALLOU PRESS NEW YORK

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1934.

| | |
|---|---|
| UNITED STATES OF AMERICA, Petitioner, against GUARANTY TRUST COMPANY OF NEW YORK, Respondent. | No. 120 |

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF ON BEHALF OF RESPONDENT GUARANTY TRUST COMPANY OF NEW YORK.

### Statement of the Case.

This action was brought by the petitioner to recover the sum of $160 on a check drawn on the Treasurer of the United States, the amount of which was paid to the respondent upon presentment for payment, and on which the endorsement of the payee is a forgery. The District Court of the United States for the Southern District of New York gave judgment in favor of the petitioner in the amount of $259.32 (R. 15-16), its opinon (R. 14, 15) not being reported. The Circuit Court of Appeals reversed the judgment of the District Court (R. 23). The opinion of the Circuit Court of Appeals (R.

19-23) is reported in 69 Fed. (2d) 799. The petition for writ of certiorari was granted on October 8, 1934.

## Statement of Facts.

The facts, which were stipulated by the parties (R. 5-13), are briefly as follows:

On or about October 29, 1921, a check was drawn by the disbursing clerk of the United States Veterans Bureau on the Treasurer of the United States in the sum of $160, to the order of Louis Macakanja, and then the check was forwarded by mail to the payee at Maja, Jugo-Slavia (R. 2). (A photostatic copy of the check appears between pages 12 and 13 of the Record.) The name of the payee appears in writing on the back of the check on the line where the payee is required to sign. His signature is presumably witnessed by two persons whose names appear thereon, and by the Mayor of the Town of Maja, whose certificate as to the payee's signature also appears on the back of the check (R. 6, 7). It has been stipulated that the endorsement of the payee is a forgery (R. 6). The purported endorsement of the payee was made in Jugo-Slavia on or about November 30, 1921, and on that date the check was transferred and delivered to the "Merkur" Bank in Jugo-Slavia for a valuable consideration (R. 6). Subsequently and about December 3, 1921, the "Merkur" Bank duly endorsed the said check and transferred and delivered it to the "Slavenska" Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration (R. 7). Both banks received the check in good faith and took it without notice of any forgery or other defect, and were not guilty of any fraud or negligence in the matter (R. 7).

On or about December 3, 1921, the "Slavenska" Bank, for value received, duly endorsed the check in Jugo-Slavia to the

order of the Guaranty Trust Company of New York, the respondent in this action, and on the same day forwarded the check to the respondent by mail (R. 8). The respondent received the check by mail from the "Slavenska" Bank on or about December 21, 1921, in good faith, and took it without notice of the forgery of the payee's endorsement or of any other defect, and was not guilty of any fraud or negligence in taking the same (R. 8). The respondent was a purchaser of the check for value, and not a collecting bank. The respondent, after receiving the check, endorsed the same in New York and presented it to the Federal Reserve Bank of New York, as Fiscal Agent of the United States of America, for payment (R. 8). The Treasurer of the United States, upon receipt of the check from the Federal Reserve Bank of New York, paid the same by crediting the Federal Reserve Bank of New York with the amount of the check, and that Bank in turn credited the respondent with the amount of the check some time in December, 1921 (R. 12). On April 27, 1926, the petitioner ascertained that the payee's endorsement on the check was forged, and on June 1, 1926, requested reclamation through the Federal Reserve Bank of New York from the respondent, which was refused (R. 12).

The following is the English version of what appears on the back of the aforesaid check (as stipulated by the parties) (R. 6, 7):

"Form approved by the Comptroller of the Treasury December 17, 1917.

I acknowledge the receipt of the sum of $160. (One Hundred Sixty Dollars).

Notice to the Payee

This check must be endorsed in ink or in indelible pencil on the line below by the person in whose favor

it is drawn and the name must be spelled exactly the same as it is on the face of the check.

If endorsement is made by mark [X] it must be witnessed by two persons who can write, giving their place of residence in full.

LOUIS MACKANJA

.....

(Signature)

Witnesses
George Mrdjen
Stojan Stoic

It is officially certified that the receiver of the money as well as the witnesses, well known to this municipal administration, have in their own handwriting subscribed the foregoing instrument. The holder of this check is identical with the beneficiary thereof.

THE MUNICIPAL ADMINISTRATION OF MAJA

November 30, 1921

VUJAKLIJA
Mayor

(Stamp of the Municipal
Administration of Maja)

'MERKUR'
Banking and Exchange Business
Stanko Shon
Zagreb
Pay to the order of Guaranty Trust Co.
of New York
New York City, N. Y.
Slavenska Bank D. D. Zagreb
*.....)

(Signatures of officials
of the Slavenska Bank)"

(The stamped endorsements of the defendant, Guaranty Trust Company of New York and of the Federal Reserve Bank of New York also appear on the back of the check.)

---

* Signatures illegible.

## Questions Presented.

1. The primary question in this case is one of conflict of laws involving a negotiable instrument: Whether the law of Jugo-Slavia, where the check was negotiated and transferred, or the law of the District of Columbia, where the check was drawn and payable, should control in so far as the liability of the respondent, who endorsed the check in New York, is concerned.

2. A subsidiary question raised by the petitioner relates to the effect of a guaranty of prior endorsements given by the respondent with respect to the check involved herein.

## The Statutes Involved.

The statutes involved and the law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange are set out in the Appendix (*post*, pp. 28-29).

## SUMMARY OF ARGUMENT.

### I.

Although the check was drawn and payable by the petitioner in the District of Columbia, it was intentionally sent by petitioner to the payee in Jugo-Slavia where it would undoubtedly be negotiated in order for the payee to collect the proceeds thereof. The law of the place of transfer of a negotiable instrument determines the rights acquired by the transferee thereunder. The check in question was transferred, after the payee's endorsement was forged, first to one Jugo-Slavia bank, then to another Jugo-Slavia bank, and finally to the respondent in Jugo-Slavia, so the law of that country governs. In any event, the respondent obtained the

same rights in the check which its transferor, the second Jugo-Slavian bank had therein. Under the law of Jugo-Slavia, the place of transfer, the transferees, including the respondent, obtained a good title to the instrument and *the right to collect and retain the proceeds thereof,* in spite of the fact that the endorsement of the payee was forged. The drawer-drawee's obligation is simply to pay the instrument according to its tenor.

## II.

The warranty contained in the respondent's endorsement does not affect or defeat its right to retain the proceeds. A warranty or guaranty of prior endorsements merely guarantees that the prior endorsements are operative to transfer title to the instrument and to give the holder the right to collect the proceeds. It is not a warranty of the authentic penmanship of the payee. Since under American law title to the instrument does not pass, if the payee's signature is forged, the question of a warranty of prior endorsements naturally can hardly be separated from the question of title and the resulting right to receive payment. By reason of the substantive law of Jugo-Slavia, the respondent acquired a good title to the instrument and the right to collect the proceeds. The fact that the Treasury Regulations required an express guaranty of prior endorsements does not alter the situation since the Government is bound by the same rules which affect ordinary individuals so far as commercial paper is concerned.

# ARGUMENT.

## I.

## The Law of Jugo-Slavia Controls.

### A.

### Preliminary Considerations.

The respondent concedes that under American law the forged endorsement of the payee of a negotiable instrument is wholly inoperative, and that no right to retain the instrument or enforce payment thereof can be acquired through the forged signature (Title 22, Sec. 24, Code of Laws—District of Columbia, *post,* p. 28); (Sec. 42—New York Negotiable Instruments Law, *post,* p. 28). The respondent concedes further that a forged endorsement of the payee under American law does not constitute a negotiation of the instrument, and naturally a transferee acquiring the instrument under such an endorsement can not be deemed a holder in due course, and is subject to the defense that he has no title to the instrument because of the forged endorsement (Title 22, Sec. 60, Code of Laws—District of Columbia); (Sec. 79—New York Negotiable Instruments Law).

The law of the Kingdom of Jugo-Slavia is set forth in the Appendix (*post,* p. 29). Under that law, the provisions of which the petitioner conceded in the stipulation of facts (R. 8), the transferee of a negotiable instrument obtains a good title to the instrument *and acquires the right to collect and retain the proceeds* thereof, even though the endorsement of the payee is forged, where there is a chain of endorsements from the payee to the transferee, and where the transferee gives valuable consideration for the instrument

and takes the same without notice of any forgery or other defect, and is not guilty of fraud or negligence.

The real issue in this suit, therefore, is whether the American law as embodied in the Negotiable Instruments Law, or the law of Jugo-Slavia, which represents the continental view, should govern in so far as the rights of the respondent are concerned.

If the American law is to apply here, then the petitioner is entitled to a reversal of the judgment below, but if the law of Jugo-Slavia is to control this situation, then the Circuit Court's judgment should be affirmed.

The Government in its brief has not seen fit to discuss this question, which is one of conflict of laws, to any extent and apparently takes the position that American law should obtain here because under that law a transferee taking under a forged endorsement gets no title, cannot enforce payment and is not holder in due course.

As stated above, the respondent does not dispute the provisions of the American Negotiable Instruments Law, but does contend that under the rules of conflict of laws, the law of Jugo-Slavia must control under the circumstances.

The Government in its brief apparently seeks to avoid the real issue. Although the Government in the first instance seems to concede the applicability of the law of Jugo-Slavia, nevertheless it refuses to give effect to the provisions of that law, and then proceeds to argue the question presented, as though it were governed exclusively by American law. It concedes that the respondent *may* have a bare legal title to the instrument by reason of the Jugo-Slavian law, and that as between transferees that law *may* apply (pp. 8, 9 and 11 of its brief), but it overlooks the fact that the Jugo-Slavian law not only provides that the transferee gets a good legal title to the instrument in spite of the forgery, *but also that the*

*transferee acquires the right to collect and retain the proceeds thereof.* As a result, the main issue in this case is confused, and the Government's argument proceeds on a complete misconception of the provisions of the Jugo-Slavian law.

B.

UNDER CONFLICT OF LAWS THE LAW OF THE PLACE OF TRANSFER OF A NEGOTIABLE INSTRUMENT DETERMINES THE RIGHTS ACQUIRED BY THE TRANSFEREE.

Although the authorities on this subject are not numerous, we submit that it is well settled that in determining what rights a transferee has acquired to a negotiable instrument the law of the place where the instrument was transferred should govern.

In England where the law with reference to forged endorsements is the same as in this country it has been squarely held in an analogous case that in determining a party's title and rights to a check the law of the place where the check was transferred should govern and control. This case is *Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. [1905] 1 K. B. 677. There a Roumanian bank drew a check in Roumania *payable to the order of plaintiffs,* on a London bank. Plaintiffs in Roumania on the same day specially endorsed the check to A, a London firm, and wrote them a letter in which plaintiffs enclosed the check. Subsequently the check was stolen from the envelope by a clerk of the plaintiffs. Three days later the check was presented at the B bank in Vienna, Austria, by a person who desired to have it cashed. At that time it bore the endorsement of A, which was in fact a forgery, as well as the special endorsement of the plaintiffs. The B bank was ignorant of the forgery; the endorsements on the check were apparently regular and in order, and the

bank was not guilty of any negligence in cashing the check. On the same day the B bank endorsed the check to defendants and sent it by mail to defendants in London, England, where defendants cashed it at the bank on which it was drawn. The plaintiffs then brought an action to recover damages for wrongful conversion of the check on the theory that defendants had no title to the check nor right to retain the proceeds. This is really the precise point involved in the present case.

Judge Walton in the lower court held that the Austrian and not the English law would control in respect of rights which had been acquired by the defendants.

As stated before, the English law is the same as the general American law. However, under the Austrian law the bona fide holder of a check who has given value in ignorance of any flaw in the title of the transferor is entitled to the check and the proceeds thereof although the endorsements upon it have been forged.

Judgment was given for the defendants upon the ground that by the transfer in Austria the Vienna bank obtained a good title in the check, which was then transferred to the defendants, who, when they presented the check for payment, were dealing with their own property. This judgment was unanimously affirmed by the Court of Appeal.

Judge Vaughan Williams of the Court of Appeal said, at pages 683-684:

> "I think that the view taken by Walton, J., of the effect of the decision in *Alcock* v. *Smith* ([1892] 1 Ch. 238), that the rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by indorsement, is right; although in the case of *Alcock* v. *Smith* the transfer was not by indorsement, but by process of law in the shape

of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by the payee against an indorsee, who claims under a forged indorsement giving him a good title in the country where the indorsement was made.

But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby."

Judge Williams thus indicated clearly in his opinion that the same rule should apply against the drawer or acceptor of the instrument.

The mere fact that the instrument involved there was a foreign bill should not make any difference, particularly when we consider that here the check was deliberately sent by the petitioner to the payee in Jugo-Slavia for negotiation and transfer.

The rule enunciated in the *Embiricos* case relating to the transfer of negotiable instruments was definitely approved by the Court of Appeals of the State of New York in a unanimous decision in the case of *Weissman, et al.* v. *Banque de Bruxelles,* 254 N. Y. 488. In that case Judge Pound stated, at page 494:

"Bills and notes were developed under the law merchant as convenient instrumentalities of trade and commerce. They pass from hand to hand by indorsement and delivery, and properly are governed by the rule relating to the transfer of tangibles. *The rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country*

*in which the transfer takes place, applies to the transfer of checks or bills of exchange by indorsement.* Goodrich on Conflict of Laws, p. 363 et seq., and cases cited; Embiricos v. Anglo-Austrian Bank, [1905] 1 K. B. 677." (Italics ours.)

This rule has again been stated with approval by the Court of Appeals in the recent case of *Hutchison* v. *Ross,* 262 N. Y. 381, at pages 389, 390.

The American Law Institute and leading writers on the subject advocate the same rule.

See American Law Institute, Tentative Restatement, Conflict of Laws (Proposed Final Draft No. 4, dated March 22, 1934), Section 282, which states:

"§ 282. Embodiment of Right in Document.

(1) Whether a right is embodied in a document depends upon the law which created the right.

(2) The validity of the conveyance of a right embodied in a document depends upon the validity of the conveyance of the document.

(3) The validity of a conveyance of a document in which a right is embodied as stated in Subsection (1) is governed by the law of the state where the document is at the time of the conveyance."

The comments and illustrations of this and prior drafts support fully our position.

Comment (b) of the proposed final draft says that "Documents which embody rights include common law or mercantile specialties, as for instance negotiable bonds, bills, notes, and checks".

The following illustration was given under Section 282 in a prior draft (Draft No. 34, dated October 16, 1930):

"A check on a bank in state X is stolen in State Y and there negotiated. By the law of Y the indorsee gets a perfect title; by the law of X no title passes under the circumstances. The indorsee presents his check for payment to the bank on which it is drawn. It should be paid."

A further illustration is given in the proposed final draft:

> "A bond payable to bearer in state X is stolen in state Y and there negotiated. By the law of Y the purchaser gets a perfect title; by the law of X no title passes under the circumstances. The purchaser presents the bond for payment to the bank at which it is payable. It will be paid."

Professor Lorenzen of Yale University in his treatise, *The Conflict of Laws Relating to Bills and Notes*, states at page 140 that title to a negotiable instrument acquired in conformity with the law of the place of transfer should be recognized with respect to all parties to the instrument (See his discussion at pages 139 and 140*).

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* Lorenzen, *The Conflict of Laws Relating to Bills and Notes*, pp. 139-140:

> "On the one hand it may be said that a party executing a negotiable instrument or becoming a party thereto may be reasonably charged with notice that the bill or note may be transferred in a state other than the one in which it was issued or in which it is payable and that he shall be bound, therefore, by the law of such state. The modern rule relating to the transfer of chattels may be invoked by way of analogy in favor of this view.
>
> Looking at the question from the standpoint of American law, the question would be whether a title acquired under the law of the place of transfer through a forged indorsement should be respected. Is not such a passing of title opposed so clearly to our fundamental notions of justice that giving effect thereto would be in contravention of our policy? The author is inclined to accept the view of Vaughan Williams, L.J., (referring to the *Embiricos* case) and to recognize a title acquired under the law of the place of transfer. Whether the owner of a negotiable instrument whose signature has been forged or whether the party who in good faith acquired such instrument should be protected is a question in regard to which Anglo-American law has taken one view and the continental countries another. * * * Whether one rule or the other should be chosen is merely a question of commercial policy. As no moral issues are involved the recognition of such foreign acquired title would not shock the conscience of our courts. In the opinion of the author the uniform act should provide that each party be held if the holder of the instrument has acquired title in accordance with the municipal law of the state where such party's contract was made, but that title acquired in conformity with the law of the place of transfer shall be recognized with respect to all parties" (Matter in parentheses ours).

Goodrich on *Conflict of Laws* states, at page 361:

> "The transfer of an intangible chose in action is by assignment, and is governed by the law of the place of assignment.
>
> If the chose in action has assumed the form of a commercial specialty such as a bill of exchange or promissory note, its transfer is governed by the law of the place of the document at the time of the transfer."

See his discussion on this question at pages 363-364.

See also

Minor *Conflict of Laws,* pages 392 and 393.

This Court has also applied this rule to the transfer of stock certificates in *Disconto-Gesellschaft* v. *U. S. Steel Corp.,* 267 U. S. 22, at 28-29.

See also

*McClintick* v. *Cummins,* 15 Fed. Cas. 1272, No. 8699;

*Brook, Oliphant & Company* v. *Vannest,* 58 N. J. Law 162;

*Fogarty* v. *Neal,* 201 Ky. 85;

*Dundas, et al.* v. *Bowler, et al.,* 8 Fed. Cas. 30, No. 4141.

C.

THE TRANSFER OF THE CHECK IN QUESTION TOOK PLACE IN JUGO-SLAVIA.

The petitioner has stipulated that the transfers to the "Merkur" and "Slavenska" banks occurred in Jugo-Slavia (R. 6, 7). The transfer to the respondent was also made there. It is further stipulated that the check was endorsed by the "Slavenska" Bank to the order of respondent for value,

in Jugo-Slavia, and then mailed to respondent in New York (R. 8). The placing of the check in the mails constituted, in legal effect, a delivery to respondent in Jugo-Slavia, and hence a transfer to respondent there.

See

*Hayden* v. *Chemical National Bank,* 84 Fed. 874; affirmed in 174 U. S. 610;

*Chapman* v. *Mills and Gibb,* 241 Fed. 715; affirmed 250 Fed. 1018.

Regardless of whether the transfer to the respondent be considered to have occurred in Jugo-Slavia or some other place the respondent acquired the same title and rights to the check which its transferor, the "Slavenska" Bank had at the time of transfer (Title 22, Sec. 78, Code of Laws—District of Columbia, *post,* p. 28); (Sec. 97 of New York Negotiable Instruments Law, *post.* p. 28).

## D.

### Under the Law of Jugo-Slavia the Respondent Acquired a Good Title to the Check, and the Right to Collect and Retain the Proceeds.

According to the conflict of laws rules announced by the courts in the cases cited, and by the textwriters mentioned under B hereof, the law of Jugo-Slavia, and not the American law, should control in determining the rights of the respondent herein, since the check was transferred in Jugo-Slavia.

Under the law of that country, the two Jugo-Slavian banks and the respondent acquired not only a good title to the check, *but also the right to collect and retain the proceeds,*

since each gave value for the instrument, took it in good faith without notice of any forgery or other defect, and was not guilty of any fraud or negligence in the matter, and the instrument purported to bear a chain of endorsements from the payee to the particular holder, transferee or endorsee involved (R. 6-8).

The application of the Jugo-Slavian law with reference to the rights acquired by the respondent, which was not a mere collecting agency, but a purchaser for value, is manifestly just and fair in this case when we consider that the petitioner sent the check by mail to the payee, Louis Macakanja, in Jugo-Slavia (R. 2). In so doing the petitioner must reasonably have anticipated that the instrument would undoubtedly be negotiated in that country in order for the payee to collect the proceeds of the check, and further that the law of that country might differ from the American law with reference to negotiable instruments. Petitioner cannot now complain, if it appears that under the law of Jugo-Slavia, where the instrument was transferred, the transferees obtained a good title thereto and the right to retain and collect the proceeds, although the endorsement of the payee was a forgery.

This is not a case where personal property has been surreptitiously removed from a jurisdiction and taken to another jurisdiction where the laws give good title to the transferee in spite of a theft. Here the petitioner deliberately sent the check to Jugo-Slavia, and thereby consented that the law of that country with reference to forged endorsements should control in determining the rights acquired by the transferees.

As stated under "A" hereof, the Government has completely overlooked that provision of the Jugo-Slavian law which gives the transferee "the right to collect and retain the proceeds" of the check, in addition to a good title to the instrument.

Inasmuch as the Government's argument proceeds chiefly upon this misconception, it seems advisable at this time to answer briefly the argument advanced on pages 9 and 10 of the Government's brief to the effect that in certain instances an individual may have legal title to an instrument purporting to be negotiable, but still have no enforceable rights against the maker thereof.

It is there stated that in some cases an intervening discharge in bankruptcy deprives the holder of an enforceable right against the drawer. *Blackwell* v. *Farmers & Mechanics National Bank,* 97 Texas 445, and Section 63 of the National Bankruptcy Act are cited for this proposition.

The *Blackwell* case does not involve a bankruptcy at all, and furthermore the plaintiff, the holder of some notes, was there permitted to recover.

Section 63 provides that a fixed liability as evidenced by an instrument in writing, such as a negotiable instrument, is provable against the bankrupt. Obviously, if the holder of an instrument neglects to file his claim within the time allowed, a discharge in bankruptcy of the drawer will cut off his rights therein. This is the same situation as when the holder of a valid negotiable instrument neglects to commence suit to collect the same prior to the running of Statute of Limitations. In these instances, the fault lies wholly with the holder himself.

The Government also cites in its brief (p. 10) some cases where the death of the drawer of a check prevents its enforceability against him by the holder. The case of *Weiand's Administrator* v. *State National Bank of Maysville,* 112 Ky. 310, merely sets forth the well established rule that the drawer of a check may at any time prior to presentation revoke it, and that the death of the drawer operates as such

revocation. In *Pullen* v. *Placer County Bank,* 138 Cal. 169, the court held that the giving of the check involved was not a completed gift under the provisions of a California statute and therefore the holder was not entitled to collect it. We submit that these cases have no possible bearing on the questions involved in the present case.

The Government then states the general proposition that where a person acquires title to an instrument after maturity, he takes the instrument subject to any defenses which the maker or drawer may have, and consequently may have no enforceable rights. *Beneficial Loan Association* v. *Hillery,* 95 N. J. L. 271, involved a promissory note acquired after maturity, and *State ex rel. Hadley* v. *Greenville Bank,* 187 S. W. (Mo.) 597, dealt with certificates of deposit, all payable several months after date, and taken after maturity. These cases can have no application to the instant one. A check is not considered overdue so as to render the holder subject to defenses which the drawer may have against a prior holder unless there has been an unreasonable delay in presenting it. (*Bull* v. *Bank of Kasson,* 123 U. S. 105, *8 Corpus Juris,* Sec. 608, New York Negotiable Instruments Law, Sec. 131 and Sec. 322.) The contention has never been made that the check involved here was overdue at the time the respondent acquired it, or that it was not presented for payment within a reasonable time, and under the circumstances surrounding the issuance, negotiation and presentment of the check no such contention could be made.

We submit that the argument made by the petitioner that the respondent, although it may have title, stands in no better position than the holders of the negotiable paper in the cases cited by the petitioner, has no merit since, as we pointed out above, these cases present situations which have

not the slightest analogy to the one with which we are here concerned.

The Government argues that the respondent is seeking to enlarge the obligation of the petitioner, the drawer-drawee of the check. This is not so. We are not urging any obligation on the part of the defendant other than that it pay the instrument according to its tenor (Title 22—Sec. 91—Code of Laws—District of Columbia, *post,* p. 28); (Sec. 111—New York Negotiable Instruments Law, *post,* p. 29). This obligation, we respectfully submit, the petitioner cannot escape because, under the law of Jugo-Slavia, where the transfers took place, the respondent in spite of the forged endorsement of the payee, acquired good title to the instrument and the right to collect the proceeds thereof.

## II.

**The warranty contained in the respondent's endorsement does not affect or defeat its right to retain the proceeds.**

In order to understand clearly the meaning of a warranty or guaranty of prior endorsements it is necessary to consider briefly the effect of a forged endorsement and the theory of an action of this type.

Under the American law, as stated *supra,* where the endorsement of the payee of a check is forged, a subsequent holder gets no title to the same and has no right to enforce payment (Section 42—New York Negotiable Instruments Law, *post,* p. 28); (Title 22, Section 24; Code of Laws—District of Columbia, *post,* p. 28).

See also

*Seaboard National Bank* v. *The Bank of America*, 193 N. Y. 26, at 30, 31;

*Geering* v. *Metropolitan Bank*, 170 N. Y. App. Div. 751, at 752, aff'd 225 N. Y. 711.

Accordingly, the theory of an action of this kind is that money has been paid under a mistake of fact and in reliance upon a representation or warranty that the party presenting the instrument has good title to the same and the right to collect the proceeds. Since the presenting party has no such title or right by reason of the forged endorsement under American law, there has been no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, as money had and received to his use. *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. 26, at 34, 35.

The petitioner's complaint shows that this action was brought on this theory. Paragraph Ninth of the complaint alleges the forgery and then goes on to state that "defendant had no right, title or interest of, in or to said check, or to the possession thereof, and no right or authority to collect the same" (R. 3).

As the respondent obtained a valid legal title to the check and the right to collect the proceeds under the law of Jugo-Slavia, then the money represented by the check was properly paid to it, and it should be permitted to retain the proceeds.

The respondent has always contended and urges here that a warranty or guaranty of the genuineness of prior endorsements is nothing more than a guaranty that the prior endorsements are operative to transfer title to the instrument and consequently give the holder the right to enforce payment thereof. The courts under the common law and the

Negotiable Instruments Law invariably couple a warranty or guaranty of prior endorsements with the question of the passing of title and the rights incident thereto. It is clear from the opinions of the courts that the significant element is the passage of title of the instrument, including the right to collect the proceeds, rather than the authenticity of the penmanship of the endorsements.

See

*Leather Manufacturer's Bank* v. *Merchants' Bank, supra;*

*United States* v. *National Exchange Bank,* 214 U. S. 302, at 316;

*Insurance Co. of North America* v. *Fourth National Bank* (Dist. Ct. N. D., Georgia), 12 Fed. (2d) 100, at 101;

*Central National Bank* v. *North River Bank,* 44 Hun (N. Y.) 114, at 115;

*Lennon* v. *Grauer,* 159 N. Y. 433, at 435.

Naturally, under American law the question of a warranty of prior endorsements can hardly be separated from the question of title and the right to enforce payment, since under that law, if the payee's signature is forged, title does not pass and there is no right to collect the proceeds. It is therefore almost impossible to conceive of a case under American law where, upon transfers made solely in this country, a holder might have title, and yet the payee's signature might be forged.

The whole purpose of negotiable instruments in the commercial world is to provide a system by which money can be paid to the party who acquires good title to the instrument. All the machinery regulating transfers and endorsements of negotiable instruments is concerned solely with the

transfer of title and the rights incident to such title. To whom would the proceeds of a check be paid if not to the legal owner thereof?

We submit that the warranty of an endorsement does not warrant the handwriting or the authentic penmanship of the payee but merely that the endorsement by whomever written was sufficient to pass title to the instrument and the right to enforce the same. This can be tested in the following instances. If the signature is written by an authorized agent of the payee, the penmanship is not that of the payee but of the agent, and yet the warranty of endorsement is not broken since title passes to the subsequent holder by reason of the agent's having been authorized to sign the payee's name. The same thing would be true where the signature of the payee was originally unauthorized, but subsequently ratified. By reason of the substantive law in Jugo-Slavia, where the transfers of the check involved here occurred, the same result follows as in the case of an endorsement by an authorized agent, or where there has been subsequent ratification of an unauthorized signature, in the United States, namely, the acquisition by the respondent of a good title to the check and the right to collect the proceeds.

The full reasoning of the Circuit Court of Appeals on this point is as follows (R. 22-23):

> "The action of the defendant in stamping the statement 'Previous endorsements guaranteed' on the check before presenting it for payment is urged as a basis of recovery. Ordinarily such a warranty means that the indorser warrants that previous indorsements are genuine and payment made in reliance upon the warranty may be recovered upon proof that such an indorsement is not. Onondaga County Savings Bank v. U. S. (C. C. A. 2), 64 F. 703; United States v. National Exchange Bank, 214 U. S. 302, 29 S. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184; Farmers' State Bank v. United States

(C. C. A.), 62 F. (2d) 178. But this is so when previous indorsements must be genuine to give a good title to the one who guarantees them. The guaranty is one of the title rather than of authentic penmanship or its equivalent. When, as here, the indorsements are of the same sufficiency in law that they would be if all were genuine, the warranty is in accord with the legal situation, and there is no breach."

In other words, the Circuit Court of Appeals below held that the payee's endorsement, by virtue of the Jugo-Slavian law, is of the same efficacy in law as it would be if genuine, and that therefore the warranty here represents the true legal situation. A warranty of signature, separate and apart from a warranty of title, would have no meaning and no consequences. The controlling factor is title, with the resultant right to collect the proceeds.

The Government contends at page 13 of its brief that the holding of the Circuit Court to the effect that the guaranty of prior endorsements is one of title rather than of "authentic penmanship" renders subsections (1) and (3) of Sections 115 and 116 of the New York Negotiable Instruments Law mere verbiage.

This, we submit, is not true. The warranty of subsection (1) of each section is merely that the instrument is genuine and in all respects what it purports to be. The check involved in this action was genuine and was actually what it purported to be, namely, a United States Government check duly issued by the Disbursing Clerk of the United States Veterans' Bureau. The warranty provided in subsection (1) has nothing to do with the warranty that the chain of title is good. That is a separate and distinct matter and is the occasion for subsection (2) of each section. Endorsements naturally come under this subsection since under American law, if endorsements are forged, there is no passage of title.

If the Government's contention is given effect, then subsection (2) would be merely surplusage because the warranty provided in subsection (1) would cover everything. Subsection (3) of each section is not in any way affected by the decision below since no contention has been raised that any of the prior parties were laboring under any disability, such as infancy or the like, and therefore did not have capacity to contract.

In the instant case, since the petitioner is the drawee of the check involved, these Sections 115 and 116 have no application anyway, because the warranties provided in the sections only run "to all subsequent holders in due course", and a drawee is not considered a holder in due course.

In New York and other states where the Uniform Negotiable Instruments Law has been adopted, a drawee is not regarded as a holder in due course.

*Dousmanis* v. *Colonial Bank,* 134 Misc. (N. Y.) 472, at 473;

*American Hominy Co.* v. *Millikin National Bank* (Dist. Ct. S. D. Illinois), 273 Fed. 550, at 555;

*National Bank of Commerce* v. *Seattle National Bank,* 109 Wash. 312, at 321, 322;

*Woodward* v. *Savings & Trust Co.,* 178 N. C. 184, at 189;

*Wells Fargo Bank & Union Trust Co.* v. *Bank of Italy,* 214 Cal. 156, at 164.

Under the decisions of this Court and the New York courts, a warranty of prior endorsements is implied in law whenever a party endorses an instrument and presents it to the drawee for payment. An implied warranty of prior endorsements is nothing more than an implied warranty of valid title. Good title, with the resulting right to collect the

proceeds, not the genuineness of the signatures, is the essence of the warranty. This was the rule at common law and still applies in so far as the relationship of drawee and endorser is concerned.

See

*Leather Manufacturer's Bank* v. *The Merchants' Bank, supra,* at 34-35;

*United States* v. *National Exchange Bank, supra,* at 316, 319 and 320;

*Central National Bank* v. *North River Bank, supra,* at 115;

*New York Produce Exchange Bank* v. *Twelfth Ward Bank,* 135 N. Y. App. Div. 52, at 53.

The petitioner also argues that it should recover in this action since the Treasury Regulations required an express guaranty of prior endorsements as a condition precedent to the payment. Even if the respondent had not given an express warranty or guaranty, when it endorsed the check, such a warranty would have arisen by operation of law, and we respectfully submit that an express warranty of prior endorsements has no greater effect than one implied in law. In any event, the warranty or guaranty of prior endorsements, whether express or implied, means only that the prior endorsements were effective to give a valid title to the holder and the right to enforce payment thereof, as stated *supra.*

The United States Government by a regulation cannot change the law in this respect or enlarge the obligations or liabilities of the respondent, as an endorser of the check, since the Government is bound by the same rules which affect ordinary individuals in so far as commercial paper is concerned. When the Government becomes a party to commercial paper, it incurs all the responsibilities of a private person under the same circumstances.

See

*Cooke* v. *United States,* 91 U. S. 389, at 396;
*United States* v. *National Exchange Bank,* 270 U. S. 527, at 534;
*United States* v. *Bank of New York,* (C. C. A. 2) 219 Fed. 648, at 653;
*Ladd & Tilton Bank* v. *United States* (C. C. A. 9) 30 Fed. (2d) 334, at 336.

If the respondent had merely endorsed the check and had refused to give an express guaranty as required by the Treasury Regulations, the petitioner could not have legally refused to make payment, because its status would be the same as that of any individual drawee or drawer. A letter referring to these same Treasury Regulations, which was sent to the respondent by the Under-Secretary of the Treasury about the time this check was paid (R. 11-12), clearly indicates that the Government did not intend by these Regulatons to increase the obligations of an endorser or to change in any way its own responsibilities as a party to commercial paper, or to make its status any different from that of the private indivdual.

We submit that the fact that the Government yearly issues great numbers of checks should not entitle it to any more consideration than a private concern which draws only a few checks, or which issues as many or more checks. See *United States* v. *National Exchange Bank, supra,* at 534. If the Government sends checks to a foreign country it must assume the risk that the law of that country may differ from the American law, and there would seem to be no reason why possible losses arising out of forgeries committed abroad should be heaped upon American banks who purchase or act as collecting agents for the paper. Banks in this country might very properly refuse to purchase or collect

Government paper negotiated abroad, if the Government is not to be bound by the law of the country of negotiation, in cases where the banks have no possible means of ascertaining the genuineness of the payee's endorsement.

In connection with this point the petitioner suggests the question of double liability on the part of the Government. As far as this case is concerned no mention has been made of any possible double liability, and we submit that it would be quite as fair to suggest that if the petitioner were to succeed in this case, it would do so to its clear profit.

In this connection we wish to make the point that a warranty or guaranty of prior endorsements is in no sense a warranty that the Government may not be subjected to other demands by the same or a different party or to additional liability apart from the negotiable instrument involved. It is by no means a general contract of indemnity. The point, we respectfully submit, merely emphasizes our contention that a warranty of prior endorsements, limited as it necessarily is to the negotiable instrument in question, cannot be anything other than a warranty of title to that particular instrument, and the resulting right to enforce the payment thereof.

## CONCLUSION.

**In accordance with the foregoing, it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.**

Dated, New York, N. Y., October 30, 1934.

Respectfully submitted,

JOHN W. DAVIS,
THEODORE KIENDL,
Counsel for Respondent.

# APPENDIX.

## Statutes.

Title 22, Sections 24, 78 and 91 of the Code of Laws of the District of Columbia provides as follows:

> § 24. Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.
>
> § 78. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.
>
> § 91. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Section 42 of the New York Negotiable Instruments Law is identical to Section 24 of the Code of Laws of the District of Columbia, set forth above.

Section 97 of the New York Negotiable Instruments Law is identical to Section 78 of the Code of Laws of the District of Columbia, set forth above.

Section 111 of the New York Negotiable Instruments Law is identical to Section 91 of the Code of Laws of the District of Columbia, set forth above.

The law of the Kingdom of Jugo-Slavia in 1921 and at the present time, with reference to checks and bills of exchange, is as follows (R. 8):

> "Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where
>
> (a) the instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and
>
> (b) the said transferee, holder or endorsee gives valuable consideration for the instrument; and
>
> (c) the said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument."

The law of Jugo-Slavia further provides that

> "(a) when an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and
>
> (b) the transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements."

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IN THE

# Supreme Court of the United States

OCTOBER TERM—1934.

No. 120.

UNITED STATES OF AMERICA,
Petitioner,

AGAINST

GUARANTY TRUST COMPANY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## Motion for Leave to File a Brief as *Amici Curiæ*.

MAY IT PLEASE THE COURT:

The undersigned move for permission to file the following brief as *Amici Curiæ* herein. The question involved in the present case is whether the transfer of a commercial specialty in a country other than that of the United States is subject to the law of the jurisdiction where the transfer was made.

The undersigned, on behalf of the American Express Company, are interested in the following cases in which said American Express Company has assumed the defense, now pending in the courts hereinafter mentioned, wherein the same question involved in this case is presented for determination:

United States *v.* Guaranty Trust Company of New York, now pending in the United States District Court for the Southern District of New York, bearing file number L 55 (252); and United States *v.* Guaranty Trust Company of New York, now pending in the United States District Court for the Southern District of New York, bearing file number L 55 (79).

Due to the fact that the Solicitor General of the United States has selected this case as a test case, no opportunity may be afforded the American Express Company to present its views in connection with the determination of the issue involved. The amount of refunds involved in the above mentioned cases is substantial, and the undersigned therefore request that this Court permit them to file the following brief as *amici curiæ* in the above entitled matter.

The attorneys for the appellee and the Solicitor General of the United States have consented in writing to the filing of this brief.

Dated, New York, November 2, 1934.

Edwin de T. Bechtel
Malcolm S. McNeal Watts
*Amici Curiæ.*

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## BRIEF OF *AMICI CURIÆ*.

This brief, by permission of the Court and with the consent of counsel for the respective parties, is filed by the undersigned as *Amici Curiæ* and on behalf of the American Express Company of New York, which has assumed the defense of actions against the Guaranty Trust Company of New York involving the negotiation on the Continent of Europe of other checks issued by the Veterans Bureau of the United States, negotiated abroad and upon which the United States is asserting a right to recover the face value on the ground of forgery of the endorsements of the several payees.

## Facts.

The material facts to the issues herein are briefly stated as follows:

The Disbursing Clerk of the United States Veterans Bureau drew a check on the Treasurer of the United States, dated October 29, 1921, to the order of Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugoslavia, in the sum of $160.00. From the allegations of the complaint, which are not denied, it appears that the plaintiff thereupon forwarded the same by mail to the said Louis Macakanja at 37 Sasava Kot Glina, Z. P. Maja, Jugoslavia. On November 30, 1921 the said check was transferred and delivered for a valuable consideration to the "Merkur" Bank of Jugo-Slavia with the purported but forged endorsement of the payee upon said check. On December 3, 1921 the "Merkur" Bank endorsed the said check and transferred and delivered it to the "Slavenska" Bank, D. D., Zagreb, Jugo-Slavia for a valuable consideration. On or about December 3rd, 1921 the "Slavenska" Bank for value received, duly endorsed the said check to the order of the Guaranty Trust Company of New York, the defendant herein, and forwarded the said check to the defendant by mail. It is stipulated that all the transfers aforesaid were made in the Kingdom of Jugo-Slavia and that the "Merkur" Bank and the "Slavenska" Bank received the check in good faith for valuable consideration without negligence and without actual notice of the forgery of the endorsement of the payee or any other defect. Thereafter the Guaranty Trust Company of New York received the said check in good faith without notice of forgery in the endorsement of the payee or any other defect, and was not guilty of fraud or negligence in receiving the same, and stamped upon the back thereof "Previous Endorsements Guaranteed". The check was presented by the defendant to the Federal Reserve Bank of New York for collection and thereafter paid

to the defendant. On or about April 27, 1926 plaintiff ascertained the payee's signature on said check was forged and demanded reclamation through the Federal Reserve Bank of New York. This action was instituted on the 4th day of December, 1929. It is stipulated that the law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange, is as follows:

"Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where

(a) the instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and

(b) the said transferee, holder or endorsee gives valuable consideration for the instrument; and

(c) the said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument:

The law of Jugo-Slavia further provides that

(a) when an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and

(b) the transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

Under the law of Jugo-Slavia, an endorser does not guarantee or warrant the genuineness of prior endorsements.

The law, as above stated, was in 1921 and still is in full force and effect in Jugo-Slavia."

## Brief Reference to Facts in Case Represented by *Amici Curiæ*.

The suits in which the *amici curiæ* are interested involve similar questions of the applicability of the laws of Italy and Greece, which are substantially, if not exactly, identical with the law of Jugo-Slavia, to endorsements of similar checks issued by the Veterans Bureau to payees in Italy and Greece and endorsed in those countries and collected from the Treasurer of the United States in similar manner. In both actions the Government alleges that the endorsements of the respective payees are forged. The facts on this appeal are typical of the facts in the other proceedings. In these suits the Guaranty Trust Company is the nominal defendant being the bank of deposit, or successor to the bank of deposit of the American Express Company, which has assumed the defense of the actions.

In one suit it will affirmatively appear that the checks there in litigation were mailed to the payee in the Kingdom of Italy by their deposit in a branch post office of the Kingdom of Italy in the City of Naples. The mailing was done by the Consular representatives of the United States in the Kingdom of Italy.

## The Issue.

The issue herein is whether the Circuit Court of Appeals for the Second Circuit was right in holding in the first instance that the law of Jugo-Slavia was to be applied to the transfers of the check in that country, and, further, that under the law of Jugo-Slavia the Guaranty Trust Company obtained a good title to the instrument and had right to collect and retain the proceeds thereof irrespective of its endorsement upon the item.

## Summary of Argument.

The following points are submitted as determining the issues on this appeal:

I. The issue of the check in suit involved two things, the making out of the check and delivery. The delivery was by mailing the check to the payee in Jugo-Slavia. The act of the drawer of the check in delivering it for the purpose of making it a valid instrument in the hands of a person in Jugo-Slavia, entailed the consequences that every result actually flowing from the means adopted for delivery bind the drawer.

*Heavey* v. *Commercial National Bank,* 27 Utah 222;

*Weisberger Co.* v. *Barberton Savings Bank,* 87 Ohio St. 21.

II. The petitioner has sued to recover back the amount which it paid upon the check in question, on the ground that a particular endorsement, that of the payee, was a forgery. The stipulated record shows that the forgery, if any, was committed in Jugo-Slavia. The record stipulates that the law of Jugo-Slavia is contrary to the Government's contention.

*United States* v. *National Exchange Bank,* 270 U. S. 527;

*Cuba R. R. Co.* v. *Crosby,* 222 U. S. 473;

*Slater* v. *Mexican National R. R. Co.,* 194 U. S. 120.

III. The weight of authority of the United States and England has applied to the transfer of commercial specialties the rule of international law for the transfer of tangible chattels, that is to say, the method of their transfer and the rights and liabilities arising therefrom

are to be determined by the law of the country in which the instrument physically is at the time the transfer takes place.

*Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. (1905), 1 K. B. 677;

*Disconto-Gesellschaft* v. *U. S. Steel Co.,* 267 U. S. 22;

*Weissman* v. *Banque de Bruxelles,* 254 N. Y. 488.

## Argument.

It is submitted that the United States Circuit Court of Appeals for the Second Circuit was correct in holding that the law of Jugo-Slavia applied to the transfer of the item in suit and also that the said Court fully considered and properly enunciated the principles which must govern the case at bar.

However, in view of the fact that the petitioner has raised a contrary contention before this Court, the following points are presented:

## POINT I.

Under the Negotiable Instruments Law as it prevails in the District of Columbia, the issue of an instrument thereunder requires two things, each of which may result in a liability of the drawer. The instrument must be made out in accordance within the terms of the statute. It must also be delivered. The Court of Appeals of the State of New York has held that unless there is shown a valid and actual delivery, or a sufficient constructive delivery to the payee, no liability can be predicated under the Negotiable Instruments Law. Specifically the Court held,

> "Act and intention are the essential constituents of a delivery which makes the instrument operative according to its terms. The final question is, did the

obligor do such act in reference to it as evidences their intention to give it, in the possession or control of the obligee, effect and operation according to its terms."

*Grannis* v. *Stevens,* 216 N. Y. 583.

The record on this appeal establishes that the United States Government, the plaintiff, mailed the check to the payee, Louis Macakanja, at an address in Jugo-Slavia. The clear inferences from the Government's act are that the payee was in that country, and the Veterans Bureau which issued the item, knew that it would go into the payee's possession in that country, and would be endorsed for purposes of collection in the jurisdiction to which it had been sent. The form of payment adopted by the petitioner, *i. e.,* a check, necessitated that the item would be transferred, otherwise the instrument would have been uncollectible unless the payee came back in person to the United States to collect it. Checks are employed by millions for making payments in foreign countries. They cross national lines in the ordinary course of business affairs. Their transfer for collection is part of the purpose of the parties who issue them, that is to say, to put individuals in other jurisdictions in funds. The United States having made its delivery, could not prevent transfer for collection under the Jugo-Slav law.

The responsibility of a drawer of an instrument may arise from two sources. Those obligations which flow from the terms of the instrument are the usual type of responsibility passed upon by courts. From the nature of the law of the United States, instances where a drawer's direct responsibility arises from delivery and not from the terms of the instrument, are necessarily rare. In its contention and argument the petitioner seeks to ignore and escape from the effect of its own act in making delivery in the form which it adopted. There is a definite responsibility on the drawer and issuer of a check or similar instrument which may arise wholly from the act of delivery and be quite independent of its terms. The

liability of the drawer to pay a person, not the intended payee, who receives and negotiates a check, negligently delivered, is an illustration of this proposition.

The significance of delivery of a check is well expressed in the language of Justice McCarthy of the Supreme Court of the State of Utah, in the case of *Heavey* v. *Bank*, 27 Utah 222, decided in 1904. In that case a check was intended to be sent to James Molloy of Corinne but actually sent to James Malloy of Denver; the latter having previously received notice from the drawer of a deposit in his favor, intended for James Molloy of Corinne, wrote and requested the bank to send the check to him at Denver. Justice McCarthy said:

> "Appellant contends that James Malloy, having procured the draft by artifice and fraud, acquired no right or title to the same, and that his indorsement, which appellant insists, was a forgery, could not and did not invest respondent with any legal right to recover on the instrument which Malloy himself did not possess, however innocent and free from blame the respondent may have been in the part he took in the transaction which eventually put him in possession of the draft. The rule contended for by appellant has been held to apply to cases in which the draft or bill has been lost or stolen, and then negotiated upon a forged indorsement, but the facts in this case do not bring it within that rule. The draft in question was issued by appellant on Malloy's order, in his favor, and he is the man to whom it was sent. True, appellant at the time believed him to be the James Molloy of Corinne, in whose favor the deposit was made against which the draft was supposed to have been drawn. The fact, however, remains that James Malloy, of Denver, is the man to whom the draft was sent. The record shows that when he negotiated the instrument he made no attempt to impersonate some other person, and he indorsed it by writing his own name on the back thereof without any intention that his signature should be taken for that of any other person. Under these circumstances, whatever crime Malloy may have

committed by procuring and negotiating the draft in the manner he did, it is evident that his indorsement of it did not constitute forgery."

In another case of almost similar facts, *First National Bank* v. *Exchange Bank,* 49 A. D., N. Y. 349 (1900), Justice McLaughlin, after reviewing the facts which misled the drawer of the check into believing that it was aware of the identity of the person to whom the instrument was being forwarded, said,

> "The plaintiff in good faith and for value purchased the draft from the *person* to whom it was sent and for whom it was intended and it thereby acquired a good title."

The Court dealt with a parallel case of misdelivery, to the situation disclosed in *Heavey* v. *Commercial National Bank,* and rendered a like decision in,

> *Weisberger Co.* v. *Barberton Savings Bank,* 87 Ohio State 21; 34 L. R. A. (N. S.) 1101.

The facts upon which the court decided disclosed that the plaintiff drew a check to one Max Roth, who, the plaintiff knew, did business at 48 Walker Street, New York City. The plaintiff, however, mailed the check to Max Roth at 48 Walker Street, Cleveland, Ohio. The postman did not find any Max Roth at the address, but did deliver the letter to a Max Roth on Henry Stret, Cleveland, Ohio. This second Max Roth collected the check from the drawee bank and it was held the plaintiff could not recover.

The foregoing authorities and others of the same effect were cited in *Slattery & Co.* v. *National City Bank,* 114 Misc. (N. Y.) 48, to a state of facts which indicated that the plaintiffs, brokers, had on their books an account in the name of Harold E. Richards of Bartlesville, Oklahoma, and another account in the name of Harold E. Richards, of Rockdale, Texas. After the latter account

had been closed out for some time, a check to the order of Harold E. Richards, and charged to the account of the Richards of Oklahoma, was mailed to the Richards in Texas. The Court aptly expressed the effect of the act of the plaintiff in misdelivering the check by stating the intent to make the check payable to the man in Oklahoma, was superceded and blotted out by the actual delivery of the instrument to the man in Texas.

The method of delivery of the Veterans Bureau checks, one of which is involved in this appeal, and which have been issued by millions (the serial number of the check in suit being 40,282,540), is an important, and we submit, conclusive element in determining the liability on instruments of that class which have had a history beyond the borders of the United States. In the case in which the *amici curiæ* are interested the fact will appear that the Government made delivery of the checks there in suit by depositing them in a post office maintained by the Government of the Kingdom of Italy in the City of Naples. Insofar as the Government predicates any argument upon the law of the District of Columbia having attached to the check by virtue of delivery under the law of the District of Columbia, it should be understood that this is not the invariable custom of the United States Government. We contend it makes no difference under what law delivery is made in those instances where the act of delivery involves transmitting the item for the use of the payee in a different jurisdiction. So far as the consequences of transfer, endorsement or negotiation by the payee are concerned, they must be determined by the law to which the drawer submitted his written instrument by the form of delivery which he adopts.

## POINT II.

The petitioner, the United States, is not resisting in this case an obligation apparently created against it by the negotiation of a check under the laws of Jugo-Slavia, upon the contention that such negotiation was illegal in fact. It is suing to recover the amount paid in 1921 in discharge of a pre-existing obligation. Its position is affirmative. It is seeking to recover moneys paid out. It must show definite grounds for recovery. The grounds constituting the basis of its cause of action are pleaded in the fifth paragraph of the complaint. That paragraph reads:

> "FIFTH: That the letter containing said check was taken or received in Jugoslavia by some person other than the payee thereof, and that thereafter the name Louis Macakanja was written on the back of the said check, by some person other than the payee thereof, and by a person who was not authorized to sign the name of the said payee, and who had no right, title or interest in or to said check, with possession thereof, and no right or authority to receive, endorse or dispose of same."

It will be noted that the phraseology of the complaint omits pleading an element essential under the law of Europe, namely, that no benefit was received by the payee from the item. The proof herein, being the stipulated record supporting the foregoing allegation, reads:

> "The said purported endorsement of the said payee on the said check is a forgery."

Forgery is well known to the common law. It is a conclusion embodying certain facts, namely, the writing of a person's name without authority and uttering the forged instrument with intent to defraud. The term has been adopted in the various Negotiable Instruments statutes for the purpose of attaching certain civil consequences to the facts constituting forgery. The United States has stipulated that this "forgery" or the acts which underlie

it, and which are implied by it, took place in Jugo-Slavia. We submit that it is clear that the United States is in court predicating a recovery against the defendant upon acts which happened in the Kingdom of Jugo-Slavia, to whose law the check was subjected by the form of delivery to the payee adopted by the United States.

It has been held that in suits of this nature the Government is subject to the same rules affecting ordinary individuals, and must meet the requirements of pleading and proof applied to other litigants.

> *United States* v. *National Exchange Bank,* 270 U. S. 527, 534;
>
> *United States* v. *Bank of New York,* 219 Fed. 648, 653 (C. C. A. 2nd);
>
> *Ladd & Tilton Bank* v. *United States,* 30 Fed. (2d) 334, 336 (C. C. A. 9th).

Mr. Justice Holmes of this Court, in *Cuba R. R. Co.* v. *Crosby,* 222 U. S. 473, decided in 1912, said (478):

> "It may be that in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared. *Parrot* v. *Mexican Central Railway Co.,* 207 Mass. 184. Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. *Slater* v. *Mexican National R. R. Co.,* 194 U. S. 120, 126. * * * 479 (1.3) We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is a reason for doubt, he must allege and prove

it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold.

In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.*, 169 Fed. Rep. 869."

*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356.

*Beau* v. *Morris*, 221 U. S. 485.

The same Justice in *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, stated:

"But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

There is a meritorious reason in fact for insisting upon this contention. The difference in the conditions of business and population between the Continental European countries and those of the United States has given rise to widely different methods of dealing with checks. The business world has recognized and the laws of the countries reflect the difference in attitude of the individuals of the various populations in handling financial paper. It is a serious question whether the Negotiable Instruments Law could ever have passed in the United States, had such a high percentage of illiteracy existed, as exists in Europe. The characteristic of American law is the insistence upon

the validity of the handwriting. A similar attitude of the law of the land in Europe would have robbed checks of much of their usefulness.

Checks of the United States Government sent to American soldiers, or their families, in Europe, should be treated in no different manner than local items in ordinary business relations. The law laid down by this Court, above quoted, is just and logical.

It is common knowledge among business men dealing with financial paper having international use, that large numbers of checks are not endorsed in European countries every time title or possession is transferred. Instruments, payable to order, are treated practically as bearer instruments in small communities where the payee is trusted. An item to his order may change hands a dozen times with benefit to each transferor before the last recipient endorses it to a bank for collection. But under the rules of all law, when such endorsement is put on, it must be in the name of the payee. Under such conditions the law of Jugo-Slavia is appropriate for the needs of its subjects. We submit that it would be manifest unfairness to hold that the collecting endorser, taking a good title to an item under the law of Central Europe, should be held to be an Insurer. It is significant that the record contains no stipulation that the petitioner has been forced to pay the amount of this check twice. As the matter stands upon the agreed facts, recovery by the United States may be based upon a technical interpretation of the Negotiable Instruments Law.

## POINT III.

There seems to be an unquestioned weight of authority in the United States and England against the contention of the petitioner. The rule that commercial specialties including checks are governed as to their transfer by the law of the jurisdiction where the paper is at the moment of transfer, appears to have recognition by authority and

is applied without substantial exceptions. The rule is sound and gives effect to the view taken by Judge Chase in the Court below. The inference to be drawn from the decisions which have passed upon the precise question, is that so far as the transfer of commercial specialties is concerned, especially those whose history involves the laws of several jurisdictions, title, meaning the right to collect and retain the proceeds, is the primary consideration of the courts when they are called upon to enforce the rule of international law.

We especially direct the attention of the Court to *Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. (1905), 1 K. B. 677. The facts in that case are a close parallel to those on this appeal. A Roumanian bank drew a check in Roumania on a London bank payable to the order of the plaintiffs, and they specially endorsed the check to a London firm and placed it in an envelope for mailing. The check was stolen from the envelope by a clerk of the plaintiffs. It was presented to a bank in Vienna bearing the endorsement of the London firm, which was in fact a forgery. The special endorsement of the plaintiffs, the original payees, and that of the London firm to which they in turn had endorsed the item, showed on the instrument the complete chain of endorsements necessary to pass good title to the Vienna bank which was ignorant of the forgery. The Viennese bank was found not guilty of any negligence in cashing the check. Good title passed to it, and when the Vienna bank sent the check with its endorsement to the defendants in London, it was cashed by them at the bank upon which it was drawn. Judge Walton in the lower Court, gave judgment for the defendants in an action for conversion. On appeal, Judge Vaughan Williams of the Court of Appeals, in affirming the Court below, said, at pages 683-684:

> "I think that the view taken by Walton, *J.*, of the effect of the decision in *Alcock* v. *Smith,* (1892 1 Ch. 238), that the rule that the validity of the transfer of chattels must be governed by the law of the country

in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by indorsement, is right; although in the case of *Alcock* v. *Smith* the transfer was not by indorsement, but by process of law in the shape of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by the payee against an indorsee, who claims under a forged indorsement giving him a good title in the country where the indorsement was made.

But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English Law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby."

In direct analogy to the foregoing decision is the opinion by Mr. Justice Holmes of this Court, in *Disconto-Gesellschaft* v. *U. S. Steel Co.,* 267 U. S. 22 (1925). The facts disclosed by that decision involve the transfer of shares of stock of a New Jersey corporation under the law of England.

The facts in the case were that a number of certificates of United States Steel Corporation, made out to London brokers and endorsed in blank were physically in London at the outbreak of the World War and by virtue of the Public Trustee acts passed by Parliament the Public Trustee seized and held the certificates as the property of a hostile alien. The opinion at pages 28-29 states:

"Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one

can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things done being sufficient by the law of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase. *Yazoo & Mississippi Valley R. R. Co.* v. *Clarksdale,* 257 U. S. 10. The things done in England transferred the title to the Public Trustee by English law."

A case which is seemingly the exact converse of the situation disclosed upon this appeal, was decided by the Court of Appeals of the State of New York in 1930. *Weissman, et al.,* v. *Banque de Bruxelles,* 254 N. Y. 488. Mr. Justice Pound who rendered the decision in that case stated the facts to be that a check was drawn on the Treasurer of the United States for refund of income tax unlawfully collected, to the order of the Bensaude Corporation, and was mailed by the Treasurer in Washington, D. C. to the corporation in the State of New York. The President of the corporation endorsed the check in the corporation's name and mailed it to the Banque de Bruxelles, Lisbon, for collection and credit to his personal account. Under the law of New York a corporation check so endorsed and credited to a personal account, creates a liability which can be enforced against the collecting bank. Under the above facts the law of New York operated to prevent the Banque de Bruxelles from obtain-

ing title to the check or the right to collect it. The handwriting of the endorser or the right of the President to endorse appear not to have been considered. The decision turned clearly upon the provision of the law of the State of New York prohibiting the diversion of corporate funds to a private account.

On page 494, Judge Pound definitely applied the rule of international law that the transfer of commercial specialties was governed by the rules for the transfer of movable chattels, that is to say, by the law of the place where the transfer was actually made. His exact language is,

> "The question then arises whether a check, being an evidence of debt merely, has a different *situs* than tangible personal property. *People ex rel. Hoyt* v. *Commissioners of Taxes,* 23 N. Y. 224. On this point the weight of authority is to the effect that, if the chose in action has assumed the form of a commercial specialty, such as a bill of exchange or promissory note, its transfer is governed by the law of the place of the document at the time of the transfer. Bills and notes were developed under the law merchant as convenient instrumentalities of trade and commerce. They pass from hand to hand by indorsement and delivery, and properly are governed by the rule relating to the transfer of tangibles. *The rule of international law, that the validity of a transfer of movable chattels must be governed by the law of the country in which the transfer takes place, applies to the transfer of checks or bills of exchange by indorsement.* Goodrich on Conflict of Laws, p. 363 *et seq.,* and cases cited; *Embiricos* v. *Anglo-Austrian Bank,* (1905) 1 K. B. 677." (Italics ours.)

Another pertinent analogy is supplied by the case of *Hutchinson* v. *Ross,* 262 N. Y. 381, where the same rule of transfer was applied in determining the validity of the transfer of funds and securities in the State of New York for the purpose of creating a trust, admittedly good under the law of the State of New York but asserted to be illegal under the marriage laws of the Province of

Quebec. Justice Lehman of the Court of Appeals of the State of New York approved the *Weissman* case above quoted and applied the law of transfer with all its consequent rights in the parties thereto of the State of New York, in which the transfer took place.

Stress is laid by the petitioner upon the formal words of the endorsement stamped upon the back of the item by the defendant. The statement is "Previous Endorsements Guaranteed". We submit that the previous endorsements, being acts done within the jurisdiction of Jugo-Slavia while the instrument was physically within the limits of that jurisdiction to which it was sent by the petitioner, are sufficient in law and that the defendant acted without liability to repay the amount of the check by reason of its guarantee of them.

## Conclusion.

It is therefore respectfully submitted upon the foregoing decisions that the defendant, Guaranty Trust Company of New York, received a good title to the check issued by the Veterans Bureau, and has a right to retain the proceeds which it collected from the Treasurer of the United States.

Respectfully submitted,

EDWIN DE T. BECHTEL
MALCOLM S. MCNEAL WATTS
*Amici Curiæ.*

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pp. 1, 2, 4, 5, 8

# SUPREME COURT OF THE UNITED STATES.

No. 120.—October Term, 1934.

| | |
|---|---|
| United States of America, Petitioner, *vs.* Guaranty Trust Co. of New York. | On Certiorari to the United States Court of Appeals for the Second Circuit. |

[December 10, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

On September 5, 1929, the United States brought in the federal court for southern New York, this action to recover from the Guaranty Trust Company $160 with interest. That sum was claimed as damages resulting from the payment to the Trust Company, through the Federal Reserve Bank of New York acting as fiscal agent of the United States, of a check, payable to Louis Macakanja drawn on the Treasury of the United States by the disbursing clerk of the United States Veterans' Bureau. The complaint alleged that the letter containing the check had been mailed to the payee in ~~Jugo Slavia~~ Yugoslavia; that neither the "payee of said check nor any one on his behalf had ever received or endorsed the same"; and that "the letter containing the check was taken or received in Jugoslavia by some person other than the payee thereof, and that thereafter the name of Louis Macakanja was written on the back of the said check by some person other than the payee thereof, and by a person who was not authorized to sign the name of said payee and who had no right, title or interest in and to said check, with possession thereof, and no right or authority to receive, endorse or dispose of the same."

The answer set up as a special defense that the "check was negotiated and transferred in the Kingdom of Jugo-Slavia"; that under its law "upon the negotiation and transfer of a check every transferee, if he takes without actual notice of any alleged forgery or other defect, in the absence of fraud or gross negligence, obtains a good title to the instrument, even if the endorsement of the payee is forged, and acquires the right to collect and retain the proceeds"; that "each of the transferees of the check mentioned in the com-

plaint gave valuable consideration and took without notice of any alleged forgery or other defect, and without fraud or negligence, and thereby obtained a good title to the instrument and acquired the right to collect and retain the proceeds"; and that the "defendant under the law of Jugo-Slavia, duly obtained title to said check, as aforesaid, and duly collected and retained the proceeds."[1]

The case was tried before a jury. The evidence consisted of an agreement as to facts and the cancelled check. The agreement recited, among other things, that the purported endorsement of the payee was a forgery, made in ~~Jugo-Slavia~~; that on or about November 30, 1921, the check was transferred and delivered there to the "Merkur" Bank; that the "Merkur" Bank duly endorsed the check and transferred it in ~~Jugo-Slavia~~ to the "Slavenska" Bank; that the "Slavenska" Bank endorsed and transferred the check in ~~Jugo-Slavia~~ to the Guaranty Trust Company and forwarded it by mail; that each of these banks paid a valuable consideration, received the check in good faith, took it without notice of the forgery or other defect, and was not guilty of any fraud or negligence; that "the Treasurer of the United States upon receipt of said check paid the same by crediting the Federal

Yugoslavia

[1]The law of the Kingdom of ~~Jugo-Slavia~~ in reference to checks and bills of exchange, according to the stipulation, was in 1921, and still is, as follows:

"Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where

"(a) The instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and

"(b) The said transferee, holder or endorsee gives valuable consideration for the instrument; and

"(c) The said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument:

"The law of Jugo-Slavia further provides that

"(a) When an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and

"(b) The transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

"Under the law of Jugo-Slavia an endorser does not guarantee or warrant the genuineness of prior endorsements."

Reserve Bank of New York with the amount''; that, in December, 1921, that Bank credited the Trust Company with the amount; that the United States first learned of the forgery on or about April 27, 1926; and that on June 1, 1926, it requested, through the Federal Reserve Bank, reclamation from the defendant, which was denied.

The check, dated October 29, 1921, was payable to the order of ''Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugoslavia.'' When presented for payment, it bore what purported to be his endorsement made in the presence of two witnesses and a certification by the Municipal Administration of Maja to the effect that ''the holder of the check is identical with the beneficiary thereof'' and that the witnesses as well as the receiver of the money had subscribed the instrument. The check bore these further endorsements: '' 'Merkur' Banking and Exchange Business, Stanko Shon, Zagreb''; ''Pay to the order of Guaranty Trust Co. of New York, New York City, N. Y. Slavenska Bank D. D. Zagreb''; also the stamp of the Guaranty Trust Co. ''Previous Endorsements Guaranteed''; and the stamp of the Federal Reserve Bank.

Each party moved for a directed verdict. The District Court directed a verdict for the plaintiff in the sum of $160 with interest from June 1, 1926; and entered judgment for that amount. The Court of Appeals reversed the judgment, 69 F. (2d) 799. This Court granted certiorari, 293 U. S. —.

*First.* The check was both drawn and payable in the District of Columbia. By the law of the District a forged endorsement of the payee is declared to be wholly inoperative.[2] Ordinarily, a subsequent bona fide holder for value without notice of the forgery would acquire neither title to the instrument nor the right to enforce payment; and would acquire no right to retain the proceeds if payment were made in ignorance of the forgery. But under settled principles of conflict of laws, adopted by both federal and

[2]Code of Laws of the District of Columbia, Title 22, Sec. 24, and also Sec. 42 of the New York Negotiable Instruments Law provides: ''Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.''

state courts, the validity of a transfer of a chattel brought into a country by the consent of the owner is governed by its law; and that rule applies to negotiable instruments. *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677; *Weissman* v. *Banque de Bruxelles*, 254 N. Y. 488, 494. Compare *Disconto-Gesellschaft* v. *United States Steel Corporation*, 267 U. S. 22, 28. See *Queensboro Nat. Bank of the City of New York* v. *Kelly*, 48 F. (2d) 574, 576. Here, the rule is particularly applicable; for the Government, having made the check payable to one therein described as resident in ~~Jugo-Slavia~~ and having mailed it to his ~~Jugo-Slavia~~ address, must be deemed to have intended that it should be negotiated there, according to the law of that country. It was thereby given something of the quality of a foreign bill; although technically the check was delivered within the District when mailed there. Compare *Koechlin et cie* v. *Kestenbaum Brothers*, [1927] 1 K. B. 889; see Lorenzon, Conflict of Laws Relating to Bills and Notes, (1919) p. 135, n. 267. The law of ~~Jugo-Slavia~~ provides that the transferee in due course acquires, despite the forgery, not only "a good title to the instrument", but also "the right to collect and retain the proceeds thereof." As the Government sent the check to ~~Jugo-Slavia~~ and the forged endorsement and the transfers of the check were made there, its law governs the validity of the transfer; and the banks acquired, at least, a good title to the check.[3]

*Second.* The Government contends that although the title to the check may have passed from the payee to the Trust Company, it acquired, as against the drawer, no right either to enforce payment or to retain the proceeds paid. The argument is that, since the check was both drawn and payable within the District, the obligation arising therefrom is governed by its laws; that, under the law of the District the drawer agreed to pay the check only on the order of the payee; and that since there was no such order and the payment made was in ignorance of the forgery, the money may be recovered as having been paid under a mistake. The law of the District determines the formal and essential validity of the check, the interpretation of the contract, the incidents of the obligation. But the Trust Company does not attempt to enlarge or modify the obligation of the drawer as determined by the law of the District.

[3]Compare McClintick *v.* Cummins, 3 McLean 158; Fed. Cas. 8,699; Dundas *v.* Bowler, 3 McLean 397; Fed. Cas. No. 4,141; Russell *v.* Grigsby, 168 Fed. 577, 580; rev. on other grounds, 222 U. S. 149.

The question presented is: Has the Trust Company, by acquiring title to the check, acquired the right to enforce the obligation which it represents. The enforcement does not contravene the public policy of the District. The question relates to the incidents of the transfer of title to a chattel; and, hence, is determined by the law of ~~Jugoslavia~~ Yugoslavia. The Trust Company is not confronted with any procedural obstacle, like that presented in some jurisdictions where the transferee of a non-negotiable cause of action seeks to sue thereon in his own name. Compare *Harper* v. *Butler,* 2 Pet. 239, 240. Nor is the Trust Company confronted by a divergent public policy of the forum, which forbids its courts from applying the ~~Jugoslavian~~ Yugoslavian law. Compare *Bond* v. *Hume,* 243 U. S. 15; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 277. Indeed, the courts of New York, where this suit was brought, would doubtless give effect to the rule of the foreign law here relied on. Compare *Weissman* v. *Banque de Bruxelles,* 254 N. Y. 488, 494.

The Government argues that acquisition of the legal title to negotiable paper does not necessarily imply acquisition of a cause of action thereon. It is suggested that even an instrument properly endorsed by the payee so as to transfer the title may fail to confer any right to enforce the obligation of the maker, as where the cause of action had been lost by a discharge in bankruptcy; and that when the title to the instrument is transferred to a bona fide holder for value without an endorsement, or after maturity, the transferee may fail to acquire a right to enforce payment, because such paper is subject to any defense open as against the payee. But those rules have no application here. The discharge in bankruptcy operates upon the obligation represented by the check regardless of who the holder may be. The transferee without endorsement, or after maturity, acquires the rights which the payee had; and it is those rights only which the Trust Company asserts. To conclude that the forged endorsement was sufficient to pass legal title, but insufficient to transfer the right of the payee to collect the proceeds, would deprive the transfer of "title" of all significance except as regards the right to retain a scrap of worthless paper.[4]

[4]Compare Texas *v.* White, 7 Wall. 700, 735; Meuer *v.* Phenix Nat. Bank, 94 App. Div. 331; aff., 183 N. Y. 511; Peterson *v.* Swanson, 176 Minn. 246; Beneficial Loan Ass'n *v.* Hillery, 95 N. J. L. 271, 276.

*Third.* The Government contends, that irrespective of considerations discussed above, the Trust Company is liable because of its endorsement. The argument is that its endorsement, made when the check was presented for payment through the Federal Reserve Bank of New York, is an independent contract governed by the law of New York, *Spies* v. *National City Bank,* 174 N. Y. 222, 225; that, by the Negotiable Instruments Law of that State, the endorsement warrants, besides the title, the authenticity of penmanship of the payee or the authorization of the endorsement in his name;[5] and that, if there be doubt as to the meaning and effect of an endorsement under the law of New York, there can be no doubt as to the Trust Company's obligation, because of the terms of its stamp: "Prior endorsements guaranteed." The express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement; namely that the endorsements were effective to give to the holder a legal title and the right to enforce payment of the check.

*Fourth.* The Government contends that it is entitled to recover because of exceptional rights conferred in express terms by regulations of the Treasury and of the Federal Reserve Bank of New York. A Treasury circular then in effect provided for the handling of Government checks by the Reserve Banks and branches "subject to examination and payment by the Treasurer of the United States."[6] A Reserve Bank circular recited: "The Government has for many years exercised the right of returning at any time warrants and checks which for any cause have not been considered good, and the Federal Reserve Bank of New York as fiscal agent of the United States as a condition of receiving

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[5]Negotiable Instruments Law of New York provides:

Section 116. Every endorser who indorses without qualification, warrants to all subsequent holders in due course;

(1) The matters and things mentioned in subdivisions one, two and three of the next preceding section; and

(2) That the instrument is at the time of his endorsement valid and subsisting.

The "matters and things" in sec. 115 so referred to are:

(1) That the instrument is genuine and in all respects what it purports to be;

(2) That he has a good title to it;

(3) That all prior parties had capacity to contract.

[6]Treasury Department Circular No. 176. December 31, 1919.

government warrants and checks on the Treasurer of the United States from member banks or through the New York Clearing House reserves the right to charge back any such item and return the same at any time unconditionally to the institution from which it was received."[7]

The argument is that with knowledge of these regulations the check was presented by the Trust Company for payment through the Reserve Bank of New York, and sent by the Bank to the Treasurer of the United States; that the Treasurer paid the check by crediting the Reserve Bank with the amount and the Reserve Bank so credited the Trust Company; that the Trust Company was not obliged to avail itself of the facilities of the Reserve Bank; and that having done so with full knowledge of the regulation, it consented that the Government might charge back any such item and return the same at any time unconditionally. *Closter National Bank* v. *Federal Reserve Bank of New York,* 285 Fed. 138, 140, is cited as establishing this proposition. And it is suggested, that, since the rule there declared is controlling, no occasion exists for deciding the question of conflict of laws presented by the petition for certiorari. The rule declared in the *Closter* case has no application here.[8] That case dealt solely with the relation between the holder of the check and the collecting agency employed. As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals. Compare *United States* v. *National Exchange Bank,* 270 U. S. 527, 534; *Lynch* v. *United States,* 292 U. S. 571, 579. Moreover, the Government expressly disclaimed the assertion of a preferred position.[9]

[7]Reserve Bank Circular No. 258. March 1, 1920.

[8]The United States was not a party to that litigation. The Closter Bank sued the Reserve Bank, collecting agent, for the proceeds of a check. The court held that it was a term of the employment that the Reserve Bank might charge back any amount paid on a check if the Government refused final payment; and that hence it was unnecessary for the Reserve Bank to prove that the check in question was forged: "By the terms of the collecting agreement under which the defendant in error performed the service, the collection agent had the right, if it acted in good faith, to charge back the item to the plaintiff in error's account, without the necessity of establishing forgery or alteration of the warrant."

[9]See letter of Jan. 12, 1922, by L. P. Gilbert, Jr., Under Secretary, to The Guaranty Trust Company.

Additional reasons are suggested for affirming the judgment of the Court of Appeals: That the Government cannot recover on the guaranty of prior endorsements, because it has failed to show damage from the alleged breach. That it cannot recover the money as having been paid under a mistake, because it has failed to show "that the defendant cannot retain the money with good conscience." Compare *United States* v. *Chase National Bank*, 252 U. S. 485, 495. That recovery must be denied, regardless of the foreign law, because on the agreed facts, the Government is, under § 24 of the Code of the District, "precluded from setting up the forgery." Compare *Hortsman* v. *Henshaw*, 11 How. 177. Since we sustain the special defense based on the law of ~~Jugo-Slavia,~~ Yugoslavia we have no occasion to pass on these matters.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*